INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	5
Constitutional, Statutory and Procedural Rules Provisions Involved	6
Statement of Facts	13
Reasons Urged for Granting The Writ	15
Point One	
The Warrant To Search Was Issued On The Basis Of An Affidavit Containing Insufficient Information From Which To Make An Independent Determination Of Probable Cause, In Clear Conflict With Applicable Constitutional Standards	15
Point Two	
The Court Below Erred In Upholding The Search Of The Premises Located At #951 Southard Street Because Said Premises Were Not Mentioned In The Underlying Affidavit And Are Physically Separate From The Area Allegedly Used For An Unlawful Purpose	17
Point Three	
The Order Entered Permitting The State Reciprocal Discovery Is Violative Of Petitioner's Right To Remain Silent And His Right Against Self-Incrimination	18
Conclusion	19
Appendix	1a

TABLE OF CASES CITED.

PAGE

Aguilar v. Texas, 378 U. S. 108, 12 L. Ed. 2d 723 (1964) 15, 16

Beck v. Ohio, 379 U. S. 89, 13 L. Ed. 2d 142 (1964) 17

Brady v. Maryland, 373 U. S. 83, 10 L. Ed. 2d 215 (1963) 18

Cogen v. United States, 278 U. S. 221, 49 S. Ct. 118, 73 L. Ed. 275 (1928) 3

Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1948) 2

DiBella v. United States, 369 U. S. 121, 82 S. Ct. 654 7 L. Ed. 2d 614 (1962) 3

Dumbra v. United States, 268 U. S. 435, 69 L. Ed. 1032 (1925) 15

Griffin v. State of California, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) 4

Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U. S. 378, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964) 4

Malloy v. Hogan, 378 U. S. 1, 84 S. Ct. 1489 4

Mercantile Nat'l Bank v. Langdeau, 371 U. S. 555, 83 S. Ct. 520, 9 L. Ed. 2d 523 (1963) 3

Nathanson v. United States, 290 U. S. 41, 78 L. Ed. 159 (1963) 17

Spevack v. Klein, 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) 4, 18

Spinelli v. United States, 393 U. S. 410, 21 L. Ed. 2d 637 (1968) 15, 16

State v. Bell, 89 N. J. Super. 437, 215 A. 2d 369 (App. Div. 1965) 3

	PAGE
State v. Contursi, 45 N. J. 422, 209 A. 2d 829 (1965)	3
State v. Fioravanti, 78 N. J. Super. 253, 188 A. 2d 308 (App. Div. 1963)	3
State v. Wade, 81 N. J. Super. 139, 214 A. 2d 411 (App. Div. 1965)	3
Swift & Co. Packers v. Compania Columbiana Del Caribe, S. A., 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206 (1949)	2
United States v. Fratello, 44 F. R. D. 444 (S. D. N. Y. 1968)	4, 18
United States v. Hinton, 219 F. 2d 324, (7 Cir. 1955)	17
Williams v. Florida, 26 L. Ed. 2d 446 (1970)	19

STATUTES, RULES AND AUTHORITIES CITED

	PAGE
New Jersey Rules Governing Criminal Practice:	
R. 3:5-7	3, 8, 13
R. 3:13-3	9, 10, 11, 12, 14, 18, 19
New Jersey Statutes:	
2A:112-3	13
2A:121-3	13
Federal Statutes:	
28 U.S.C. § 1257 (3)	2, 3, 6
U.S. Constitution:	
Amendment IV	6
Amendment V	6
Amendment XIV	7

IN THE

Supreme Court of the United States

October Term, 1970
No. .

CHARLES I. COSTELLO,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF CHARLES I. COSTELLO TO THE SUPERIOR COURT AND SUPREME COURT OF NEW JERSEY.

Petitioner prays that a Writ of Certiorari issue on behalf of petitioner Charles I. Costello from the judgment of the Superior Court of the State of New Jersey denying petitioner's motion to suppress illegally seized evidence and granting the State's motion for reciprocal discovery and the Orders of the Superior Court, Appellate Division, and the Supreme Court of New Jersey denying the petitioner's motion for appellate review. The Orders denying review are final in effect for the reasons hereinafter stated.

OPINIONS BELOW.

The opinions of the trial court on the motion to suppress and the State's motion for reciprocal discovery were given orally and have not been published. The text of the court's opinions appear in the Appendix portion of this petition.

JURISDICTION.

Jurisdiction in this court is invoked pursuant to 28 U. S. C. § 1257 (3). The Orders compelling the petitioner to produce certain information involving the preparation and presentation of his defense and denying petitioner's motion to suppress were entered by the trial court on March 24, 1970. The petitioner's motion for leave to appeal each decision, directed to the Superior Court of New Jersey, Appellate Division was denied by order dated May 7, 1970. The petitioner then moved the New Jersey Supreme Court for leave to appeal the Appellate Division's action. Denial of this motion was entered by order dated July 1, 1970.

The denials of petitioner's motions for leave to appeal by the Supreme Court of New Jersey and the Superior Court, Appellate Division were without opinion.

Petitioner notes that 28 U. S. C. § 1257, dealing with review of state court decisions by certiorari provides for relief from "final judgments or decrees rendered by the highest court of a State. . . ." Concededly, the Orders involved here were not final in the sense of a decision of the ultimate issue. However, Orders in advance of such a judgment which finally dispose of important rights in a collateral and independent proceeding have been accorded finality by decisions of this Court. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 (1948); *Swift & Co. Packers* v. *Compania Columbiana Del Caribe, S. A.*, 339 U. S. 684, 70 S. Ct. 861, 94 L. Ed. 1206 (1949). Petitioner submits that his motion to suppress unlawfully obtained evidence is a collateral and independent matter and the Order denying said motion is final with respect thereto.

The independent character of a motion to suppress is recognized by the New Jersey Rules Governing Criminal Practice, which require the motion to be raised in advance

of trial in an independent hearing. R. 3:5–7 (a). The reason for requiring the disposition of the issue prior to trial is to avoid involvement in collateral issues during the course of the trial. *State* v. *Wade*, 81 N. J. Super. 139, 214 A. 2d 411 (App. Div. 1965). Thus, a defendant will, ordinarily, be held to have waived any objection to the admission of evidence on the ground that such evidence was unlawfully obtained unless he makes a timely motion before trial. R. 3:5–7 (e).

Moreover, it is clear that the Order denying petitioner's motion to suppress constitutes a final disposition of that facet of the matter, for the New Jersey cases clearly indicate that when a motion to suppress has been made and denied, it becomes the law of the case and the question will not be reconsidered on a subsequent motion or at trial. *State* v. *Fioravanti*, 78 N. J. Super. 253, 188 A. 2d 308 (App. Div. 1963); *State* v. *Bell*, 89 N. J. Super. 437, 215 A. 2d 369 (App. Div. 1965); *State* v. *Contursi*, 45 N. J. 422, 209 A. 2d 829 (1965).

The rule in the federal courts differs in that the pre-trial disposition of the matter can be raised again at trial, thereby precluding finality. *Di Bella* v. *United States*, 369 U. S. 121, 129, n. 9, 82 S. Ct. 654, 659, 7 L. Ed. 2d 614, 620 (1962). This difference in practice distinguishes the instant case from *Di Bella* v. *United States*, *supra*, and *Cogen* v. *United States*, 278 U. S. 221, 49 S. Ct. 118, 73 L. Ed. 275 (1928), both of which hold orders denying pre-trial motions to suppress in a federal—as opposed to a state—criminal trial are not final for purposes of appeal.

Petitioner further submits that the reciprocal discovery Order and subsequent Orders denying leave to appeal are final within the meaning of 28 U. S. C. § 1257 (3).

This Court has held final and appealable orders which finally determine substantial rights which, if not promptly reviewed, will subject a party to irreparable harm. *Mercantile Nat'l Bank* v. *Langdeau*, 371 U. S. 555, 83 S. Ct.

520, 9 L. Ed. 2d 523 (1963); *Hudson Distributors, Inc.* v. *Eli Lilly & Co.*, 377 U. S. 386, 84 S. Ct. 1273, 12 L. Ed. 2d 394 (1964). Effectuation of the discovery Order will require disclosures by the petitioner at this time. Eventual reversal of that Order after trial will be of little comfort. The petitioner's claim of a personal constitutional right to remain silent in reliance on *Malloy* v. *Hogan*, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964); *Griffin* v. *State of California*, 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965); *Spevack* v. *Klein*, 385 U. S. 511, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967); and *United States* vs *Fratello*, 44 F. R. D. 444 (S. D. N. Y. 1968) can be protected only at this stage of the proceeding. Disclosures once made cannot be recalled.

QUESTIONS PRESENTED.

1. Where The Warrant To Search Was Issued On The Basis Of An Affidavit Containing Insufficient Information From Which To Make An Independent Determination of Probable Cause, Did Not The Trial Court Err In Denying Petitioner's Motion to Suppress?

2. Did Not the Trial Court Err In Upholding The Search of the Premises Located at #951 Southard Street Because The Said Premises Were Not Mentioned In The Underlying Affidavit And Are Physically Separate From The Area Allegedly Used For An Unlawful Purpose?

3. Is Not The Rule of Court Conditioning the Petitioner's Right of Discovery In A Criminal Case On His Disclosure of Witnesses' Names, Statements Of Witnesses And the Production Of Photographs In His Possession, Unconstitutional On Its Face Because It Violates Defendant's Right To Remain Silent, And May Require Him To Give Evidence Against Himself, and Because It Requires The Relinquishment Of Certain Constitutional Safeguards In Exchange For An Attempt To Prepare An Adequate Defense?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED.

28 U. S. C. § 1257.

State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

• • •

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

U. S. CONSTITUTION.

Amendment IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V—Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indict-

ment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW JERSEY COURT RULES.

New Jersey Court Rule 3:5-7. Motion for Return of Property and to Suppress Evidence.

(a) Notice; Time; Hearing; Briefs.

On notice to the prosecutor of the county in which the matter is pending or threatened and to the applicant for the warrant, if the search was with a warrant, and in accordance with the applicable provisions of R. 1:6-3 and R. 3:10, a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply only to the Superior Court or county court of the county in which the evidence was obtained for the return of property seized and to suppress the evidence obtained, even though the offense charged or to be charged may be within the jurisdiction of a municipal court. A brief stating the facts and the arguments in support of the motion shall be submitted with the notice of motion. If material facts are disputed, testimony therein shall be taken in open court. Such motion shall be made within 30 days after the initial plea to the charge unless, the court, for good cause shown, enlarges the time. A motion made before trial shall be determined before trial. The motion may be made after trial has commenced only if the trial court finds that defendant could not reasonably have made it prior thereto.

(b) Return of Property.

If a motion made pursuant to this rule is granted, the property shall be delivered to the person entitled thereto, unless otherwise subject to lawful detention, and shall not be admissible in evidence in any court. Delivery of the property need not be made, however, until the expiration

of the time within which the State may obtain leave to appeal pursuant to R. 2:5-6.

(c) Consequences of Failure to Move.

If a timely motion is not made in accordance with this rule, the defendant shall be deemed to have waived any objection during trial to the admission of evidence on the ground that such evidence was unlawfully obtained.

(d) Effect of Irregularity in Warrant.

In the absence of bad faith, no search or seizure made with a search warrant shall be deemed unlawful because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution.

New Jersey Court Rule 3:13-3. Discovery and Inspection.

(a) Materials Discoverable by Defendant as of Right.

Upon motion made by a defendant, the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant

(1) designated books, tangible objects, papers or documents obtained from or belonging to him;

(2) records of statements or confessions, signed or unsigned, by the defendant or copies thereof;

(3) defendant's grand jury testimony;

(4) results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the matter or copies thereof, which are known by the prosecuting attorney to be within his possession, custody or control;

(5) reports or records of prior convictions of the defendant.

(b) Materials Discoverable by Defendant in the Court's Discretion—Books, Papers and Tangible Objects.

Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph relevant books, papers, documents or tangible objects, buildings or places or copies thereof, which are within the possession, custody or control of the State.

(c) Materials Discoverable by Defendant in the Court's Discretion—Witnesses' Names and Statements.

Upon motion made by a defendant, which shall be as specific as possible under the circumstances, absent a showing of good cause to the contrary the court shall order the prosecuting attorney

(1) to disclose to the defendant the names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information, and to indicate which of those persons he may use as witnesses;

(2) to permit the defendant to inspect and copy or photograph any relevant records of statements, signed or unsigned, by such persons or by codefendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of prior convictions of such persons if known to the prosecuting attorney;

(3) to permit the defendant to inspect and copy or photograph any relevant grand jury testimony of such persons or codefendants.

(d) Discovery by the State.

If the court grants discovery or inspection to a defendant

(1) pursuant to R. 3:13-3(a) (4) or (b), it may condition its order by requiring the defendant to permit the State to inspect, copy or photograph any material within the scope of such paragraphs which the defendant intends to use at

trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the State's case and that its request is reasonable;

(2) pursuant to R. 3:13-3(e), it may condition its order by requiring the defendant to disclose to the prosecuting attorney the names and addresses of those persons, known to defendant, whom he intends to use as witnesses at trial and their written statements, if any.

(e) Documents Not Subject to Discovery.

Except as heretofore specifically provided, this rule does not authorize discovery by a party of reports, memoranda or internal documents made by any other party, his attorneys or agents in connection with the investigation, prosecution or defense of the matter or discovery by the State of records of statements, signed or unsigned, by a defendant made to defendant's attorney or agents.

(f) Time, Place and Manner of Discovery and Inspection.

An order of the court granting relief under this rule shall specify the time, place and manner of making the discovery and inspection and such terms and conditions as the interest of justice requires.

(g) Protective Orders.

(1) Grounds.

Upon motion and for good cause shown the court may at any time order that the discovery or inspection sought pursuant to R. 3:13-3(b), (c) or (d) be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal

activity; protection of confidential relationships and privileges recognized by law; any other relevant considerations.

(2) Procedure.

The court may permit the showing, in whole or in part, to be made in the form of a written statement to be inspected by the court alone, and if the court thereafter enters a protective order, the entire text of the State's statement shall be sealed and preserved in the records of the court, to be made available only to the appellate court in the event of an appeal.

(h) Time of Motions.

A motion under R. 3:13-3 shall be made after the indictment or accusation and within 30 days after the entry of a plea or at such reasonable later time as the court permits. The motion shall include all relief sought under this rule. Additional relief may be granted upon a subsequent motion only on a showing of good cause.

(i) Continuing Duty to Disclose; Failure to Comply.

If subsequent to compliance with an order issued pursuant to R. 3:13-3 and prior to or during trial, a party discovers additional material previously requested or ordered subject to discovery or inspection, he shall promptly notify the other party or his attorney or the court of the existence thereof. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, it may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate.

STATEMENT OF FACTS.

On June 30, 1969, a judge of the Superior Court of New Jersey caused a warrant to be issued to "search the premises of J. C. Vending, Inc., 947 Southard Street, City of Trenton, County of Mercer, State of New Jersey, including the buildings comprising J. C. Vending, Inc. . . . [and], the commercial vehicles registered to J. C. Vending Corp. which may be found on the premises, and the colored male known as Charles Hunter Clark . . . ." The affidavit of A. M. Andaloro, a New Jersey State Police Officer, was the only matter before the judge at the time the warrant issued.

On July 1, 1969, a raid was conducted by state and local police on certain premises on Southard Street in Trenton, New Jersey, and various items were seized. The said premises are owned and occupied by the petitioner, Charles I. Costello, and leased in part, to J. C. Vending Machines, Inc., but the items seized were located at #951, an address not listed in the search warrant and premises not described in the application to search. Petitioner was subsequently indicted for conspiring to carry on and knowingly carrying on a lottery in violation of N. J. S. 2A:121–3 and N. J. S. 2A:112–3.

On March 6, 1970, after a full hearing challenging the adequacy of the affidavit underlying the warrant to search and the scope of the area to be searched as described by the warrant, the trial court denied petitioner's motion to suppress made pursuant to R. 3:5–7. At the hearing of this motion no evidence was adduced by either party as to the sufficiency of the affidavit. The argument as to sufficiency rests on the contents of the affidavit and the application of certain legal standards which petitioner contends are constitutionally required. Therefore, the contents of the affidavit will not be restated here but will be further discussed in Point One *infra*.

On the same date the trial court granted the State's motion pursuant to R. 3:13 3 (d) to require the petitioner to permit the State to inspect, copy or photograph results or reports of scientific tests or experiments; to examine books, papers, documents or tangible objects, buildings or places, which the petitioner intends to use at trial; and to disclose to the State the names, addresses and written statements of witnesses the petitioner intends to call at trial.

REASONS URGED FOR GRANTING THE WRIT.

Point One

The warrant to search was issued on the basis of an Affidavit containing insufficient information from which to make an independent determination of probable cause, in clear conflict with applicable constitutional standards.

The Fourth Amendment of the Constitution of the United States, as applied to the states by the Fourteenth Amendment, proscribes "unreasonable" searches and seizures. A search is unreasonable if based on a warrant issued without sufficient probable cause to believe that a crime has been committed and evidence of that crime is to be found at the place to be searched. *Dumbra* v. *United States*, 268 U. S. 435, 69 L. Ed. 1032 (1925).

If there was probable cause for the warrant in the instant matter to issue, it must have arisen from the only matter before the court at the time, the affidavit of A. M. Andaloro. Petitioner contends said affidavit fails to provide a basis upon which it may be said that probable cause existed for the issuance of the warrant, and the court below erred in holding otherwise.

First, the "informer" references are patently deficient. In *Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723 (1964), this Court established two requirements to be satisfied before a magistrate may accept the allegations of allegedly "reliable" informers. These were amplified in *Spinelli* v. *United States*, 393 U. S. 410, 21 L. Ed. 2d 637 (1968) which explained that the affidavit in *Aguilar* was inadequate in that it failed to set forth any of the underlying circumstances necessary to enable the magistrate to independently judge the validity of the informant's conclusions or his reliability.

In the instant matter there is absolutely no information as to underlying circumstances from which the validity of the informant's tip could be weighed. Nor is there any attempt to support the claim that the informant was reliable. There is not even the barest attempt to show how the informer acquired his knowledge, whether by surmise, speculation or personal observation, nor any explanation of how he came to the conclusion that a lottery was being conducted.

Second, the affidavit contains the mere unsupported conclusions of a law officer that certain activities constitute a lottery operation. To allow the issuing judge to rely upon such conclusionary matter removes from his determination the ultimate question of whether the *facts* show probable cause. He abandons his neutral and detached function and serves as a rubber stamp for the police. *Aguilar* v. *Texas, supra.*

Third, the surveillance itself failed to demonstrate that a lottery was being conducted on the premises of the petitioner. The affiant attributes significance to the observation of envelopes and bags and states that use of such items is common in the operation of a lottery. But they are also common in the operation of a vending machine business. A similar issue arose in *Spinelli* v. *United States, supra,* where this Court refused to attribute any nefarious purpose to the fact that the premises to be searched contained two telephones, although telephones are frequently connected with gambling operations. Moreover, there are no facts set forth upon which to base a belief that the envelopes and bags, non-suspicious and neutral in themselves, contain lottery slips or relate in any matter to the operation of a lottery.

"Probable cause" has been said to depend on whether there are facts and circumstances within the knowledge of the issuing magistrate which are sufficiently trustworthy to warrant a prudent man in believing that a crime has been committed and evidence thereof is to be found at the place

to be searched. *Beck* v. *Ohio*, 379 U. S. 89, 13 L. Ed. 2d 142 (1964). Absent the allegations of the informant, which cannot properly be considered as heretofore noted, and laying aside mere suspicions, which can never be the basis for the issuance of a warrant, *Nathanson* v. *United States*, 290 U. S. 41, 78 L. Ed. 159 (1963), it is clear that a prudent man could not, on the basis of the present affidavit, conclude that a crime of lottery had been committed or that evidence thereof was to be found at the premises of J. C. Vending Machines, Inc.

Point Two

The Court below erred in upholding the search of the premises located at #951 Southard Street because said premises were not mentioned in the underlying Affidavit and are physically separate from the area allegedly used for an unlawful purpose.

It is clear from the Fourth Amendment's requirement of particular description that the area to be searched must be limited in the search warrant to the area believed to contain evidence of crime. *United States* v. *Hinton*, 219 F. 2d 324, 326 (7 Cir. 1955).

It must be understood that the area loosely described in the present affidavit as J. C. Vending Machines, Inc., comprises several buildings and outbuildings. The main building in the complex bears the address 947 Southard Street. This is the building described in the affidavit as having the sign "J. C. Vending Machines, Inc." in front. It is this building and one other nearby building, other than #951 to which the affidavit refers when describing the comings and goings of Charles Clark. The building at #951 is some forty feet away from #947, a chain link fence forming a common perimeter between the two properties.

Although the affidavit reflected no showing or belief that #951 was involved in the alleged criminal activity, the warrant issued embraces all buildings and things generally surrounded by or accessible from the fenced area. No

suspicious conduct being observed in or around #951, the petitioner, as owner of said property, contends he is aggrieved by the illegal search thereof.

Point Three

The order entered permitting the State reciprocal discovery is violative of Petitioner's right to remain silent and his right against self-incrimination.

Petitioner contends that R. 3:13-3(d) is unconstitutional on its face insofar as it conditions petitioner's right of discovery on a reciprocal opportunity for discovery by the State. The trial court held that this did not violate any right personal to the petitioner because, as it said, the petitioner has no right to pretrial discovery.

To deny the petitioner the opportunity for discovery merely because he chooses to exercise his constitutional right to remain silent imposes a penalty on the exercise of that right. Benefits or privileges may not be conditioned on the abandonment of constitutional rights. *Spevack* v. *Klein*, 385 U. S. 511, 17 L. Ed. 2d 574 (1967).

The reasoning of *Spevack* v. *Klein*, *supra*, was applied to the issue of criminal discovery in *United States* v. *Fratello*, 44 F. R. D. 444 (S. D. N. Y. 1968) in which the court held that a rule which exacts a penalty as an alternative to the exercise of the privilege of discovery violates the Fifth Amendment.

Moreover, it is quite clear that there is a constitutional right to discover exculpatory material. *Brady* v. *Maryland*, 373 U. S. 83, 10 L. Ed. 2d 215 (1963). It would therefore seem that much of the information described in R. 3:13-3 (a), (b), and (c) must be disclosed in all events. Petitioner should still be able to assert such discovery rights for favorable evidence independent of the Rule without triggering any reciprocal discovery.

The constitutionality of New Jersey's reciprocal discovery rule has not been previously adjudicated. Petitioner

notes, however, that this Court has recently decided *Williams* v. *Florida*, 26 L. Ed. 2d 446 (1970) wherein it was held that Florida's notice-of-alibi rule, which requires a defendant to give pretrial notice of a claim of alibi and information as to the place he claims to have been and witnesses he intends to use, did not violate the defendant's Fifth Amendment privilege against self-incrimination.

Williams, supra, is not controlling here for several reasons. Firstly, the raising of an alibi defense creates special needs that it be disclosed to the prosecutor at pretrial because the defense is particularly liable to be sprung as a surprise insofar as it is easily asserted. *Williams* v. *Florida, supra,* at p. 450.

Moreover, a claim of alibi is an affirmative defense and evidence supporting it should not be helpful to the State in establishing a prima facie case. R. 3:13–3 (d), however, requires disclosure of petitioner's case generally and such evidence, while appearing exculpatory at pretrial, might later seriously damage petitioner's case and aid the State's case in chief.

CONCLUSION.

For all of the foregoing reasons, the petitioner respectfully requests that certiorari be granted in the instant matter.

Respectfully submitted,

George Pellettieri,
Attorney for Petitioner,
Charles I. Costello.

APPENDIX.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
(CRIMINAL)

THE STATE OF NEW JERSEY,

vs.

CHARLES I. COSTELLO,
CHARLES HUNTER CLARK,
et als.,

Defendants.

Indictment No. SGJ 1-69-12.

MOTION.

Before: HONORABLE SAMUEL D. LENOX, JR., J. C. C.

Place: MERCER COUNTY COURTHOUSE
TRENTON, NEW JERSEY
March 6, 1970

APPEARANCES:

GEORGE F. KUGLER, JR., Esquire, Attorney General of the State of New Jersey, by

DONALD HOROWITZ, Esquire, Special Deputy Attorney General, attorneys for the State of New Jersey.

PELLETTIERI & RABSTEIN, Esquires, by GEORGE L. PELLETTIERI, Esquire, attorneys for Defendant, Charles I. Costello.

LEON M. ROBINSON, Esquire, attorney for Defendant, Charles Hunter Clark.

Opinion—State's Motion For Reciprocal Discovery.

THE COURT: I have no problem with it. The right to discovery by the defendant is given by rules, but it is not a constitutional right. The defendant cannot be compelled to give anything. All he has to do is forego his own right to discovery. It is a reciprocal rule. It is preceded by the statement, "If the Court grants discovery or inspection to the defendant," and that can only come about by the defendant first making an application, and if there is something in that respect he doesn't want to disclose to the State, he need only not make an application to have the State's evidence produced to him and accordingly he has no problem. So on the constitutional issue I dispose of it by saying I see no merit to it.

Now, Mr. Horowitz, you are requesting a reciprocal order under Section (d) for any scientific tests or experiments made upon and related to the intercom system and the garbage disposal unit and for a list of witnesses in the language of Section 2 under part (d) of that rule. Is that all you are asking for?

MR. HOROWITZ: Yes, sir.

THE COURT: I will grant it. Submit an order.

Opinion—Motion to Suppress.

THE COURT: This motion comes before the Court under Rules Governing Criminal Practice 3:5-7, which reads:

> "On notice to the prosecutor of the county in which the matter is pending or threatened and to the applicant for the warrant, if the search is with a warrant, * * * a person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the evidence obtained may be used against him in a penal proceeding, may apply only to the Superior Court or county court of the county in which the evidence was obtained for the return of property seized and to suppress the evidence obtained——.
>
> "In the absence of bad faith, no search or seizure made with a search warrant shall be deemed unlawful

because of technical insufficiencies or irregularities in the warrant or in the papers or proceedings to obtain it, or in its execution."

I read the latter rule as a prefatory comment. I am fully appreciative that no court rule can in any way delete or infringe upon constitutional rights which a defendant has.

This being a search with a warrant, the warrant is presumed to be valid and the burden of proof is upon the defendant to show the invalidity of the search. State versus Gaudiosi, 97 New Jersey Superior 565, at page 571, said:

"In a situation where the challenged search was made under the authority of a search warrant, the warrant is presumed valid and the burden of establishing its invalidity rests upon defendant," citing, "State versus Mark, 46 New Jersey 262, 273 (1966)." With reference to the conversion situation the court continued. "But where, as here, the search was without a warrant and the legality of the search depends upon existence of probable cause or alternatively the defendant's voluntary consent to the search, the burden of proof is on the State," citing, "State versus Contursi, 44 New Jersey 422, 425 (1965)," and other cases set forth in the opinion.

Now, preliminarily, I think it is appropriate that I allude to comments of Chief Justice Weintraub of the New Jersey Supreme Court in State versus Andrew Gerardo decided February 17, 1969. I don't have the citation handy. The Chief Justice said:

"The issue must be considered in the context of the values involved. It is an unhappy fact that the capacity of the judicial process to deal with the demands of law enforcement is doubted by a substantial body of responsible men. The reasons are several. One is the lengthening line of decisions which suppress the truth or block access to it. It is idle to suppose, as some do, that those decisions have no impact upon law

enforcement or at the worst only a minimal one. The realities abound the other way. Nor should the topic be obscured by invoking the presumption of innocence. The presumption has no role on a motion to suppress. Such motions are not made for an academic end. The purpose is to suppress proof which will likely convict, so the defenders will go free.

"It bears repeating that the first right of the individual is to be protected from criminal attack. That is the reason for government. The responsibility to that end rests no less upon the judiciary than upon its coordinate branches. If the judiciary exerts its undoubted power to create new constitutional doctrines, it must first learn what authority the other departments must have. The need must be found, not in abstract contemplation, but in the tumult of the streets. Cliches and slogans will not do. So it throws no light to inveigh against a police state. It would be a bit absurd to say ours was a police state before, let us say, Mapp versus Ohio, * * * or to deride in such terms every nation which does not suppress the truth (if indeed there is any which does).

"All the competing rights involved belong to the individual. The State has none—it has only duties, and powers with which to discharge them. To set criminals free is to exact a price, not from some pain-free societal entity, but from innocent individuals who will be their next victims. There are other hurts as well, for the suppression of proof of guilt must weaken respect for the reach of the law, thereby increasing the toll of victims and injuring as well those offenders who might have been deterred from a career of lawlessness. Some would add their belief that current doctrines tend to corrupt officials who, struggling to cope with the duty realities of crime, strain to bring the facts within unrealistic concepts. These trespasses upon the first right of the individual to be protected from

attack should not lie suffered unless it is plain that some larger individual value is served.

"The question then is whether there is such other value here which rises above the first right of the individual. If not strictly relevant, it is at least noteworthy that the evidence we are asked to suppress relates to syndicated crime, for it is syndicated crime which, above all other, has found a haven in the suppression of the truth. * * *

"The Fourth Amendment does not call for the suppression of evidence obtained in violation of its provisions. The doctrine of suppression is judge-made, a device adopted upon the belief that there was no effective remedy for a violation of its terms. Suppression is ordered, not to rectify a wrong already done, but to deter future violations," citing Elkins versus the United States."

In that case Chief Justice Weintraub then quotes and says:

"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."

Again Justice Weintraub speaking:

"The purpose, then, is to deter insolence in office. To that end, the suppression of the truth is tolerated even though the price will be paid, as we have said, by the defendant's next victim. But it would be a waste of the individual's first right, his right to be protected from crime, to set the offender free when there is no trace of official arrogance. * * * In these circumstances we see no justification for the suppression of the truth. It is appropriate to repeat from United States versus Wallace and Tiernan Company * * *, that 'The Fourth Amendment, important as it is in our society, does not

call for imposition of judicial sanctions where enforcing officers have followed the law with such punctilious regard as they have here.' A search under warrants thus obtained cannot be denounced as 'unreasonable,' the ultimate test under the Amendment," citing State versus Boykins.

As I say, those are preliminary comments by me which I make primarily because this search warrant was issued by Judge Kingfield on a State Police warrant and I do not mean by any comments therein to indicate any identity of facts or otherwise between those comments and the case at bar.

Now, most important in this case, I think, is the fact that this warrant was issued not by a magistrate, but by a Superior Court assignment judge.

State versus Kasabucki, 52 New Jersey 110, a Supreme Court opinion written by Justice Francis and returned June 28, 1968, contains some very binding directions upon county and Superior Court judges in such instances and the language of the opinion consisting, of course, with the protection of the defendant's constitutional rights, I feel is quite strong and it is a very persuasive matter to me and accordingly I will read at length that portion of the opinion to which I am alluding. Justice Francis said:

"As we have noted on a number of occasions, the Federal and State Constitutions do not bar all searches and seizures. They bar only those that are 'unreasonable.' * * * A basic purpose of the framers of this important right was to protect the citizens against unwarranted invasion of his home by police officers. The intention was to impose an obligation on police officers, except in unusual situations which need not be discussed here, not to search a person's home until they have presented their estimate of probable cause for the search to the detached scrutiny of a neutral judge, and obtained his formal authorization to do so. * * *

"When the police officer does not rely on his own evaluation of the facts, but submits them to the independent judgment of a judicial officer for his determination as to whether they add up to probable cause, a search pursuant to a warrant issued by a judge cannot be equated with 'insolence in office' or abuse of the officer's police power, nor can it be said reasonably that the citizen's Fourth Amendment security rests only in the discretion of the police. • • • Thus when the adequacy of the facts offered to show probable cause is challenged after a search is made pursuant to a warrant, and their adequacy appears to be marginal, the doubt should ordinarily be resolved by sustaining the search. • • • That is because the warrant provides clear evidence of the legitimacy of the officer's purpose. The decisions bespeak the preference accorded a search authorized after the facts and inferences therefrom have been subjected to neutral judicial consideration and found to constitute probable cause for it.

"'Probable cause is a flexible nontechnical concept. It includes a conscious balancing of the governmental need for enforcement of the criminal law against the citizens' constitutionally protected right of privacy. It must be regarded as representing an effort to accommodate those often competing interests so as to serve them both in a practical fashion without unduly hampering the one or unreasonably impairing the significant content of the other. • • • Thus, although incapable of precise definition, the term has been construed to signify less evidence than would be required to establish guilt of the crime for which the warrant is sought. • • • It means something more than 'raw unsupported suspicion.' It is a suspicion of guilt that is well-grounded; a reasonable basis for belief that a crime has been or is being committed. • • • A finding of probable cause may rest upon evidence not competent at a criminal trial. • • • Hearsay is an adequate

basis for the finding and the issuance of a warrant, so long as there is something coupled with the hearsay to give it reasonable credit, something which gives it the appearance of trustworthiness. * * * When a police officer seeking a search warrant presents the basis therefor in affidavit form to a judge for evaluation on the issue of probable cause, the judge's approach must be a practical and realistic one. The officer's statements must be looked at in a common sense way without a grudging or negative attitude. There must be an awareness that few policemen have legal training and that the material submitted to demonstrate probable cause may not be described with the technical nicety one would expect of a member of the bar. Moreover, the judge should take into account the specialized experience and work a day knowledge of policemen. * * * The facts asserted must be tested by the practical considerations of everyday life on which reasonably prudent and experienced police officers act. * * * Once the judge has made a finding of probable cause on the proof submitted and issued the search warrant, a reviewing court, especially a trial court, should pay substantial deference to his determination. In fact, another trial judge of equal jurisdiction should regard as binding the decision of his brother that probable cause had been sufficiently shown to support a warrant, unless there was clearly no justification for that conclusion."

To the same effect is the earlier case of State versus Mark, 46 New Jersey 273, where Justice Jacobs said the issuing judge's finding that probable cause existed will be considered as a substantial factor tending to uphold the validity of a warrant and that his action in issuing it will not be upset on appeal though the matter be viewed as a close one.

Chief Justice Weintraub's comments were somewhat stronger than those of Justice Jacobs because Chief Justice Weintraub said that one trial court should review the

decision of his brother on the bench as being binding unless there was clearly no justification for that conclusion.

Now, the issue before the Court in viewing this application for the search warrant is whether there was in fact probable cause for the issuance of the warrant. Counsel have attacked the affidavit in support of the search warrant primarily, although not exclusively upon the basis of the Spinelli case, William Spinelli versus United States, which requires no citation. The Spinelli case was an extension, an explanation of the Aguilar case, Aguilar versus Texas, and the Spinelli case directed its criticism to a search warrant which was granted by a judge on the basis of what was alleged to be a reliable tip supported by further investigation and surveillance by the F. B. I.

I don't believe that the Spinelli case is applicable here because I don't believe that the informant's tip was used as a basis for the issuance of the search warrant.

In Spinelli the issue was pointed up by Justice Harlan where he said:

> "At this stage as well, however, the standards enunciated in Aguilar must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration?"

The emphasis, as indicated by Mr. Robinson, in the Spinelli case is on the tip, but there was no intention that if the tip were eliminated from the affidavit in support of the search warrant and probable cause still existed that the warrant would be void because it contained information with respect to an informant's information, unreliable though it may be.

Mr. Justice White in a concurring opinion said this:

> "If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else."

Repeating again: No. 1 is that he had seen the equipment and thereafter with respect to this Justice White's opinion says, "If one is true the affidavit is good." That certainly is obvious.

No. 2, that he set forth was that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred, and Mr. Justice White then with respect to that says, "But in 2 the affidavit is insufficient unless the perceived facts are given for it is the magistrate not the officer who is to judge the existence of probable cause."

Then 3 refers to the tip.

Now, I believe we are dealing here with a No. 2 situation and it is necessary that the affidavit state the perceived facts for the magistrate to judge the existence of probable cause and that is what we have in this lengthy affidavit.

I do observe that Spinelli is a controversial decision. Spinelli was a five-three decision with Justice Black, Justice Fortas and Justice Stewart dissenting. Justice Black and Justice Fortas wrote dissenting opinions and Justice Black began his dissenting opinion with I think a very loud opening salvo when he said:

> "In my view this Court's decision in Aguilar versus Texas * * * was bad enough."

Mr. Justice Marshall abstained from that opinion, and Justice Harlan's decision was supported by four of his fellow judges.

The opinions which have been returned by the various circuit courts and district courts of the United States since the return of the Aguilar opinion have been varied in their approaches to the problem and I am sure there will be further opinions from the Supreme Court which will explain, perhaps limit but certainly explain the Spinelli case.

I read not too long ago in 6 Criminal Law Reporter 2310 the case of Bridges against the United States. That was decided December 19, 1969, by the Eighth Circuit Court of Appeals. It involved a contention by the defendant that the affidavit failed to establish the reliability of the informers and failed to set forth the underlying circumstances necessary to enable the commissioner to judge the validity of the informer's statements, those statements being set forth in a search warrant which was attacked. In the text the court in this connection said:

> "We reject the defendant's first contention. The affidavit specifically states that the information furnished to Patch came from informants who had on numerous occasions given information to him which had proved to be reliable. The statement sufficiently establishes the reliability of the informants."

I recognize that is a circuit court and not the Supreme Court, but this case does not stand alone in this philosophy but rather is one of a considerable number of cases, but I must confess that there are to the contrary other circuit court opinions and district court opinions. Exactly what will be done with them I don't know. Our Supreme Court is a changing court and there are those who would believe that the Spinelli case will be considerably limited.

I observe that there is in the present affidavit in support of the search warrant on Page 2 a statement, "On April 24, 1969, a confidential informant who has given information that has proved reliable in the past advised," and so forth. And later on in the affidavit on Page 5 there is a second reference to an informer, no statement as to whether it

was the same one, but I observe that this reference to the informant occurred after much of the surveillance had already been conducted and then again you will find stated; "On May 14, 1969, a confidential informant who has given information that has proved to be reliable in the past advised me," and so forth.

An argument could be presented that these statements are entitled to weight, but I view this affidavit on the basis of the information given by the confidential informant, or informants as the case may be, as no more than the moving force which caused the investigation to be conducted which investigation forms the basis for the application for the search warrant.

With that approach to this problem I must then view the search warrant in its entirety, giving no weight to the information supplied by the confidential informant which I assume is what Judge Kingfield did since I know personally that he is familiar with the Spinelli case we having discussed it at the Judges' luncheon and on many other occasions and Judge Kingfield is, of course, not a county judge as I am, he is not merely a Superior Court judge, but he is one of a very select few assignment judges in charge of a three-county vicinage of Mercer County, Somerset County and Hunterdon County, and all of the judges of every level contained within those counties. Judge Kingfield has also been for a considerable period of time almost the sole judge to issue warrants for the New Jersey State Police in this area and vicinage, he is one of I believe two judges who has been assigned for the determination of the existence of probable cause for the issue of wiretaps under the new legislation authorizing such warrants to be issued and he has vast experience on this subject and in this field.

There is contained in this warrant, in this application for the search warrant, the affidavit, a considerable amount of factual information. The rules of evidence do not apply to an affidavit in support of a search warrant. They can

contain hearsay, they can contain a great deal of information which if in common sense warrants weight being given to it can be considered and weight can be given by the issuing judge or magistrate.

There is contained information with respect to prior arrests of the individuals whose activities were observed by the affiant. There is shown therein a statement with respect to prior arrest records of Horace Lee Shivers whose activities are described in the affidavit, Francis Ventigli, the defendant, Charles Hunter Clark, and one J. Mapp.

As mentioned by counsel for the State, in State versus Burnett, 42 New Jersey 387, there is a comment that such matters can be given probative effect where the Court there said:

> "For example, hearsay will do if coupled with something to give it credit, and evidence deemed too dangerous at trial, i.e., prior arrests and convictions, may be accorded probative effect."

There is also contained in the affidavit after a six page recitation of facts observed during the surveillance an opinion or conclusion of the affiant, New Jersey State Trooper, as to the meaning of the activities which he observed. In that connection the affidavit reads:

> "I have been a police officer for five years and during this time I have conducted numerous gambling investigations of this type. In my previous experience as a police officer, I have observed lottery operations of this type to be generally conducted in a similar manner. Bets received by the writers are recorded on slips of paper which are retained by the writer until they are turned over to a collection man usually called a runner who after gathering slips from the writers transports all of the slips to the drop or bank. Paper bags, and envelopes are common containers used in the transportation of these slips. The hours of surveillance of the aforementioned persons transporting and deliver-

ing paper bags and envelopes are indicative of the unusual hours of delivery of the slips to the bank or drop."

Judge Kingfield knows as I have learned through the trial of a considerable number of gambling cases myself what type of activities are customarily conducted in the operation of a gambling venture of this nature. I have observed as recently as the trial which I just concluded, consuming three weeks and involving four defendants engaged in an operation the activities of which were very similar to that, which is set forth in the affidavit in supporting of the search warrant activities involving the same type of transportation of white envelopes and small brown bank envelopes and paper bags, of carrying from one place to another in the operation of a drop, of the hours when the activity takes place, and it is to be noted the police officer said the hours of surveillance because activities of this nature conducted at six o'clock at night would negate an inference that this was a gambling activity. It is one of many, many matters which can be taken into consideration.

I have had on innumerable occasions marked into evidence, and I know Judge Kingfield is familiar with this type of thing, bank envelopes containing slips and paper bags containing large numbers of memorandums of lottery policy bets and horse bets.

These are matters which, of course, can be used in connection with legitimate enterprises, they can be used by housewives going shopping, but the validity of an affidavit and the finding of probable cause must be taken from the four corners of the warrant, the affidavit in support of the warrant.

As indicated previously in the Kasabucki case from which I read, the expertise and the knowledge of police officers in recognizing gambling activities is a factor to be taken into consideration and in viewing the matter as I now view it, I take into consideration not only the expertise of the police

officers but the expertise of the assignment judge who issued the warrant.

I think also the fact that the premises were surrounded as they were with a chain link fence must be taken into consideration. There are many legitimate reasons for that, but there are also reasons which would together with all the other facts support an inference to the contrary. I take into consideration the fact that this investigation and the application for the warrant was conducted not by a small local police force, but by the New Jersey State Police. While it is a small factor it is something to be taken into consideration.

I don't know of any activity which is legal which could be conducted in the manner that the activities which are described in this affidavit could be conducted, but I suppose that it is entirely possible that people would travel from spot to spot as was indicated here and then after obtaining certain things in paper bags ride by without stopping and throw them out the window and have someone come from behind a high chain link fence and pick them up and take them inside, but it is certainly a factor which should be considered in weighing the overall affidavit.

There is in this affidavit no direct as opposed to circumstantial of an operation. Unquestionably, if the evidence which is in this affidavit were presented to a court of law in its present form without a search warrant having been executed to obtain additional information, the State would not have established a case sufficient to authorize conviction even if everything contained herein is true. But as I previously mentioned in I believe it was the Kasabucki case, probable cause does not require such a level of proof.

The Burnett case at Page 387 discusses this same question where it says:

> "In dealing with probable cause, however, as the very name implies we deal with probabilities. These are not technical; they are the factual and practical

considerations of everyday life on which reasonable and prudent men, not legal technicians act. The standard of proof is accordingly correlative to what must be proved.

"'The substance of all definitions' of probable cause 'is a reasonable ground for belief of guilt.' And this 'means less than evidence which would justify condemnation' or conviction—."

As Marshall, chief justice for the court more than a century ago, observed in Locke versus the United States:

"Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where 'the facts and circumstances within the officer's knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

As I read this affidavit had I no information with respect to an informer and had I read the affidavit from beginning to end without having seen that information with respect to the informant and before I reach that point in the affidavit where the police officer gives his opinion had someone asked me what is this indicative of I would have said that it was indicative of a numbers operation because I recognize myself the familiar pattern of what is set forth in this affidavit as having been presented before me in so many cases in which there have been convictions.

You can't talk just about what was seen at the J. C. Vending Machine premises, but we must view the entire affidavit which activities described therein had their culmination at the J. C. Vending Machine premises. There is a pattern to it. There is obviously an activity described here which was a regular activity, which was an activity which was engaged in by a number of people and an activity which although contrary inferences could be drawn led me to believe and obviously led the police officers and

obviously led Judge Kingfield to believe represented the illegal activity which the State alleges in the indictment was being conducted.

It is not necessary for there to be evidence in the surveillance of actual slips having been seen or actual bets having been made or taken. If a police officer sees a man with a bottle cap and a flame under the bottle cap and hypodermic needle, he doesn't have to see heroin to know the man is using heroin. There are certain circumstances which point to an illegal activity which are short of direct evidence of that activity being conducted and it is the probable cause to believe it from the information which justified the issuance of the warrant.

I think the affidavit does clearly establish probable cause for the issuance of the warrant. The warrant was issued for premises designated as follows: "the premises of J. C. Vending, Incorporated—." I should not go to that, I suppose, before I touch upon the defendant part specifically since he has also made a motion.

The activities of the defendant Clark are described in the affidavit in a manner which shows that he was an integral part of whatever activities were being conducted and culminating at the J. C. Vending Machine property. Mr. Clark's activities are described in the warrant and the warrant which was issued said the "colored male known as Charles Hunter Clark hereinbefore described in the J. C. Vending premises or on the public street of Trent, City of Trenton, County of Mercer, State of New Jersey."

The warrant described Clark as being approximately forty years, six feet tall, mustache and so on. This affidavit is so long and the hour is so late that I am not going to attempt to marshal all of the facts as they relate to Clark, suffice it to say that his connection I have probable cause to believe he had in his possession information or paraphernalia, lottery slips or paraphernalia shown therein.

The warrant for the premises described the premises as:

> "— the premises of J. C. Vending, Incorporated, 947 Southard Street, City of Trenton, County of Mercer, State of New Jersey, including the buildings comprising J. C. Vending, Incorporated, which are generally surrounded by the chain link fence or which are accessible from within the fenced area of J. C. Vending property, the commercial vehicles registered to J. C. Vending Corporation which may be found on the premises—."

The premises in question were inaccessible to police officers other than by the surveillance which they were able to conduct from the exterior of the premises. They obviously went to a considerable amount of trouble in this connection. I was going to allude to the aerial photograph, but I guess there is no evidence before me that was taken during the course of the surveillance so I will not do so. The evidence indicates that the activities being conducted were being conducted within the confines of a chain link fence. The affidavit described activities in the vicinity of the front of the premises.

The defendant Clark and the bags which are described in the affidavit in support of the search warrant was observed in the area of the yellow garage which has been marked 3 on the aerial photograph, the main building of the J. C. Vending Machine Company marked 1 on the photograph, and the yellow garage in the rear marked 2 on the photograph, but there is no indication in the affidavit of any direct activities in the area of 4A or 4B buildings marked on the photograph.

Now, I have no hesitancy whatsoever in saying that a search of the premises or issuance of a warrant for premises marked 4A on the front of which is written, "Trans World Wig Company," I believe, is not authorized by the affidavit. Clearly, the lack of activity in that area of a nature warranting conclusion that probable cause to believe that the illegal

activity was being conducted and the presence of the name of a completely unrelated company on the front of the building would negate any reason for a search warrant being given to search that building.

Now, I think if there is probable cause to believe that with this premises surrounded as it was with the chain link fence constituting an area of apparent business enterprise and with the activities observed being at various areas of this large complex, there is probable cause to warrant the issuance of a search warrant to search all portions thereof which are under the possession and control of the J. C. Vending Machines, Incorporated, which was the name on the front of the premises and the name of the trucks that were going in and out of the premises and so forth.

The Ratushny case sets forth the law with respect to limitation of the area to be searched in the warrant based upon the constitutional protection against unlawful searches and seizures. The Ratushny case involved an apartment building with a warrant describing the entire apartment building when in fact only one apartment was to be searched and the Court correctly held that it is immaterial that only one apartment, the one they were discussing, was searched.

It is the warrant itself which is to be used in determining whether it is legal or void because if the warrant authorizes a greater search than is warranted by the probable cause shown in the affidavit in support of the search warrant, then the danger to an innocent citizen exists and that voids the warrant.

Ratushny said that where the premises reasonably believed to house illegal activities are known or reasonably should have been known by police to be premises utilized for occupancy of more than one family the search warrant must contain as specific a description of the particular area to be searched as the nature of the circumstances reasonably permits.

Now, this area being confined as it is to a complex surrounded by a chain link fence and inaccessible and there being no evidence before me to the contrary, I assume that all of this property is owned by the J. C. Vending Machine Corporation. I don't know how the officers could reasonably have been expected to have known if it is a fact that any of the area was not owned and in possession of J. C. Vending with the exception of that wig store.

I recognize there is nothing in the affidavit in support of the search warrant which names Mr. Costello as having been seen or engaging in any of the activities which are described therein and I don't know whether there is evidence before me or not, but it was stated during argument that he occupies an apartment on the second floor of Building No. 1.

I feel that the warrant as it is written limits the authorization to search to premises of J. C. Vending, Incorporated. It specifically described 947 Southard Street, which I understand is the number on the building marked No. 1 on the aerial photograph. In the absence of giving other numbers I note that Charles Costello, Jr., who testified himself did not know the number of Building No. 3 if it in fact contained another number. In the absence of another number described further the buildings of J. C. Vending, Incorporated, by stating:

> "—including the buildings comprising J. C. Vending, Incorporated, which are generally surrounded by the chain link fence or which are accessible from within the fenced area of J. C. Vending property—."

There is nothing in there that says excluding the Trans World Wig Shop, but there is nothing including it either other than a statement which might be argued to include it which says accessible from within the fenced area, but I think that must be read in conjunction with the statement, "buildings comprising J. C. Vending, Incorporated," and earlier in the search warrant the statement, "premises of J. C. Vending, Incorporated."

So I conclude first of all that the building marked 4A on Court's Exhibit No. 1 is not included in the warrant and any search thereof, if there was in fact such a search, would not be authorized by the warrant and would be a warrantless search.

The main question to me, probably not to defense counsel, is the building marked 4B and it is accessible from within the fenced area of the J. C. Vending property as stated in the search warrant. It appears from the aerial photograph to be no more accessible or inaccessible than the Trans World Wig Shop, however.

The evidence is to the effect that it was not rented to another, but was used for J. C. Vending business and was in the possession of J. C. Vending business, I conclude that from the testimony of Mr. Costello. The warrant in my opinion described and authorized a search of everything within the red markings on Court Exhibit 1 except Building 4A, and that there was probable cause sufficiently presented in the affidavit before Judge Kingfield to authorize the warrant to be so issued as requested by the affiant. Accordingly, the motion is denied.

The State will submit the order.

MR. HOROWITZ: Yes, sir.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MERCER COUNTY
(CRIMINAL)

THE STATE OF NEW JERSEY,

vs.

CHARLES I. COSTELLO,
CHARLES HUNTER CLARK,
et als.,

Defendants.

CERTIFICATE.

I, Albert M. Bernstein, C.S.R. one of the Official Court Reporters in and for the State of New Jersey, certify that the foregoing is a true and accurate transcript of my original stenographic notes, to the best of my knowledge and belief.

/s/ ALBERT M. BERNSTEIN

Dated: April 20, 1970.

[redacted]

No. [redacted]

CHARLES L. COSTELLO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

[redacted]

BRIEF AND APPENDIX OF THE STATE OF NEW JERSEY, IN OPPOSITION TO THE PETITION OF CHARLES COSTELLO FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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[redacted]

Advocate Press Corp., 11 Commerce Street, Newark, N. J. — Publication [redacted]

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF JURISDICTION	2
COUNTER-STATEMENT OF QUESTIONS PRESENTED	4
COUNTER-STATEMENT OF FACTS	5
REASONS UPON FOR DENYING THE WRIT:	
Point I—New Jersey's pre-trial criminal discovery may not be assailed by a defendant on the ground it violates the right against self-incrimination or to remain silent	10
A. The recent decision in Williams v. Florida is controlling on the question raised in Point Three of the petition regarding the constitutionality of the pre-trial discovery procedure	10
B. Even were Williams not controlling here, New Jersey's form of reciprocal discovery of witnesses intended to be called at trial, if not all forms of reciprocal discovery, is constitutionality unassailable	14
Point II—The basis upon which the warrant to search was issued met pertinent constitutional standards for probable cause	18
Point III—The search which elicited the evidence sought to be suppressed was conducted pursuant to, and in conformance with a search warrant describing the place to be searched with sufficient particularity	22
CONCLUSION	26

PAGE

Appendix:

Affidavit of Andrew Andaloro 1a

Search Warrant 17a

Cases Cited

Aguilar v. Texas, 378 U. S. 108, 12 L. Ed. 2d 723 (1964) 2, 19

Boyd v. United States, 116 U. S. 616, 6 S. Ct. 524 (1886) 15

Brady v. Maryland, 373 U. S. 83, 10 L. Ed. 2d 215 (1963) 14

Fornaris v. Ridge Tool, 400 U. S. ——, —— 4

Jones v. Superior Court, 58 Cal. 2d 56, 372 P. 2d 919, 22 Cal. Rptr. 879 (1962) 15, 16

Nathanson v. United States, 290 U. S. 41, 78 L. Ed. 159 (1933) 21

Poe v. Ullman, 267 U. S. 497, 6 L. Ed. 2d 989 (1961) 3

Prudhomme v. Superior Court, 2 Cal. 3d 320, 85 Cal. Rptr. 129, 466 P. 2d 673 ..... 16, 17

Reetz v. Bozanich, 397 U. S. 82, 25 L. Ed. 2d 68 (1970) 4

Schmerber v. California, 384 U. S. 757, 16 L. Ed. 2d 908 (1966) 10, 14

Spinelli v. United States, 393 U. S. 410, 21 L. Ed. 2d 637 (1968) 2, 18-22

State v. Angeleri, 51 N. J. 382 (1968) 14

State v. Baldwin, 47 N. J. 379 (1966), cert. denied, 385 U. S. 980, 17 L. Ed. 2d 442 (1966) 14

PAGE

State v. Daniels, 46 N. J. 425 (1966) 24

Steele v. United States, 267 U. S. 498, 69 L. Ed. 757 (1924) 3

The City of Meridian v. Southern Bell Tel. & Co., 358 U. S. 639, 3 L. Ed. 2d 562 (1959) 4

United States v. Fratello, 44 F. R. D. 444 (S. D. N. Y. 1968) 14, 15

United States v. Ventresca, 380 U. S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965) 2, 18-20

Williams v. Florida, 399 U. S. 78, 26 L. Ed. 2d 446 (1970) 3, 10-14

United States Constitution Cited

Fifth Amendment 11

Statutes Cited

N.J.S. 2A:112-3 9

N.J.S. 2A:121-3 ..... 5, 9

28 U.S.C.:

Sec. 1257 3

Sec. 1257 (3) 2

Rules Cited

Federal Rule 16 10

Rule 3:5-7 (d) 22, 24

Rule 3:13-3 (a), (b) and (c) 15

Rule 3:13-3 (d) 3, 9, 10, 14

PAGE

Rule 3:13-3 (d) (2) 10

Rule 3:13-3 (g) 9

Rule 3:13-3 (g) (1) 3, 11, 17

Rule 16 (e) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 767

CHARLES I. COSTELLO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF OF THE STATE OF NEW JERSEY IN OPPOSITION TO THE PETITION OF CHARLES I. COSTELLO FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Respondent, State of New Jersey, prays that a Writ of Certiorari be denied petitioner, Charles I. Costello, upon the various orders of the Superior Court of the State of New Jersey denying petitioner's Motion to Suppress certain evidence seized under warrant to search and granting the State's Motion for Reciprocal Discovery and the Orders of the Superior Court, Appellate Division and the Supreme Court of New Jersey denying the petitioner's motions for appellate review. No substantial fed-

eral questions, not previously foreclosed from review by recent decisions of this Court are raised by these Orders; moreover, such orders are interlocutory in character, and in the case of the Order for Reciprocal Discovery, may be properly objected to any time during the course of the proceedings. Petitioner has failed to do this and has therefore failed to exhaust his remedies under State law. For such reasons, in addition to others stated herein, the requested petition should not issue.

Counter-Statement of Jurisdiction

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. §1257 (3) which sets forth the grounds upon which petitions for certiorari from "final judgments or decrees rendered by the highest court of State" may be entertained. The Court has developed doctrines and requirements, in addition to the basic jurisdictional requirements set forth in the statute, to determine whether certiorari should issue. Application of such doctrines and jurisdictional standards dictates denial of the instant petition.

As more fully explicated herein, the trial court's disposition of questions generated by petitioner's motion to dismiss was mandated by the doctrine laid down by the Court in *United States* v. *Ventresca*, 380 U. S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741 (1965). A review of the facts underlying this petition, as set forth in respondent's Counter-Statement of Facts and Appendix, and examined in respondent's Points II and III, herein, in the light of *Spinelli* v. *United States*, 393 U. S. 410, 21 L. Ed. 2d 637 (1968) and *Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723 (1964) only serves to fortify the conclusion that no substantial federal questions, not foreclosed by prior decision, are presented to the Court in the instant petition.

The question of whether the alleged mis-designation in the warrant for search of the premises from which evidence was seized was a fatal defect rested with the trier of fact. Petitioner failed to meet his burden of proof of establishing that the officers charged with execution of the warrant, could not, with reasonable effort, ascertain and identify the place intended to be searched. *Steele v. United States*, 267 U. S. 498, 69 L. Ed. 757 (1924).

Petitioner lacks standing to challenge the constitutionality of New Jersey Rule of Court 3:13-3 (d). He has not indicated how his compliance with an order issued thereunder has prejudiced him or threatens to prejudice him by compelling self-incrimination. See *Poe v. Ullman*, 367 U. S. 497, 6 L. Ed. 2d 989 (1961).

The inchoate interest which the petitioner seeks to have protected cannot be characterized as compelling self-incrimination as is clear from *Williams v. Florida*, 399 U. S. 78, 26 L. Ed. 2d 446 (1970).

The Order for Reciprocal Discovery of the trial court cannot be considered "final" under the standards of 28 U.S.C. §1257. Apart from this, petitioner has failed to exhaust the remedy incorporated in R. 3:13-3 (g) (1) of a protective order available at "any time" to protect legal privileges, presumably because he lacks ground to claim a threat to the purported privilege. When such an order is available at any time, it is clear under *Williams v. Florida*, *supra*, that the granting of discovery can never be a final order.

The constitutionality of the New Jersey Reciprocal discovery rule has never been determined by the Supreme Court of New Jersey. This Court in *Williams v. Florida*, *supra*, indicated its approval of at least some form of pre-trial criminal discovery. The highest courts of every

state jurisdiction which have considered the question all have found that some form of pre-trial discovery by the State is constitutional. In addition, New Jersey's rule incorporates special safeguards for legally recognized privileges. Certainly the courts of New Jersey should have a chance to construe this rule before the Court takes jurisdiction on this question. *Cf. Fornaris* v. *Ridge Tool*, 400 U. S. ——, ——; *Reed* v. *Rozanich*, 397 U. S. 82, 25 L. Ed. 2d 68 (1970); *The City of Meridian* v. *Southern Bell Tel. & Co.*, 358 U. S. 639, 3 L. Ed. 2d 562 (1959).

If the Court still considers the constitutionality of certain forms of pre-trial discovery by the prosecution a viable question, respondent respectfully submits that: (1) The constitutional problems, if any, which may attend application of some forms of pre-trial discovery procedures have not appeared in either actual, or incipient form in the instant proceeding, and (2) The New Jersey procedure, because of its prophylatic provisions is not an appropriate vehicle for an exposition of the constitutionality of these questions.

For the foregoing reasons, it is respectfully submitted that this Court must find it lacks jurisdiction to entertain the matter of the instant petition for certiorari, or in the alternative, decline to assume jurisdiction.

Counter-Statement of Questions Presented

1. Is not the rule of court allowing the state reciprocal discovery of the identity of witnesses defendant intends to call at trial, as well s their statements, if any, and any scientific tests or experiments related to evidence seized pursuant to a valid search warrant, which is subject at any time in the proceeding to defendant's right to a protective order in the form appropriate to

protect "confidential relationships and privileges recognized by law.", constitutional on its face?

2. Is not a warrant to search constitutional that is issued on the basis of an affidavit containing information recited to be upon personal knowledge of the affiant, an experienced State Police Investigator, sufficient for an experienced Judge to make an independent determination, based solely on that information, of probable cause, irrespective of any incidental references to information received from confidential informants?

3. Was not the trial court correct in upholding the search of entire premises of the J. C. Vending Machine Corporation of No. 947 Southard, Trenton, including one of the "buildings comprising J. C. Vending Inc." which bore no street number but shared a back party wall with a separate, unattached building unit bearing the address No. 951 Southard Street which was occupied by another company and did not form part of the premises of J. C. Vending Machines Corporation?

Counter-Statement of Facts

On April 24, 1969, a confidential informant, who had proven in the past to be reliable, advised the New Jersey State Police that a unified lottery operation was being conducted in the City of Trenton, at various locations in the City in violation of N.J.S. 2A:121-3 in the following manner: Horace L. Shivers, operating a 1960 Rambler, or a 1959 Cadillac convertible would pick up lottery bets at various places in the City, and deliver such lottery bets at various places in the City, and deliver such lottery bets in this form to either Philip Ventigli, at his house on Princeton Avenue, Trenton, or the premises of the J. C. Vending Corporation of No. 947 Southard Avenue, Trenton.

Independent State Police checks revealed that Horace Lee Shivers, black male, age 31, had been arrested in 1965 for engaging as a messenger for an illegal lottery and possessing illegal lottery slips, and that Philip Anthony Ventigli had been arrested in 1954 for possession of lottery paraphernalia.

Over the course of the next two months, investigator Andrew Andaloro and Detectives DeMasi and Decker of the New Jersey State Police conducted intensive surveillance of the locales and persons referred to by the confidential informant. The affidavit of investigator Andaloro, which appears as respondent's Appendix (hereinafter "Ra ") recites in copious detail, the nature and extent of the surveillance, as well as the personal observations the officers made in the course of their investigation.

In addition to the subjects Shivers and Ventigli, mentioned by the informant, other persons including the defendant Charles H. Clark, an employee of the J. C. Vending Corporation who had an arrest record for grand larceny, and John O. Mapp, who had a record of numerous arrests for lottery violations, were regularly observed about the subject J. C. Vending Machine premises, engaging in the collection and delivery of various envelopes and paper bags of the type commonly employed in illegal "numbers games".

The pattern observed by the detectives was characterized by a regularity of time, participants, and routine, and had been accurately reflected by their informant. The Court's attention is directed to Officer Andaloro's affidavit which is noteworthy as an example of experienced policemen refusing to rest upon an informer's tip or their own suspicions, but rather, painstakingly document-

ing the indications of suspicious activities and drawing their own conclusions, based upon far more than the information cited in the "tip".

On June 30, 1969, Investigator Andaloro applied for a warrant, solely on the basis of recitals made in the affidavit, to Judge Frank J. Kingfield of the Superior Court.

Andaloro stated therein, that he had been a police officer for five years; he had conducted numerous gambling investigations and had determined that illegal lottery operations were typically characterized by the same pattern he had just observed: the recording of bets received by the "writers" on slips of paper which are retained by the writer until they are turned over to a collection man or "runner" who, after gathering slips from the writers, transports all the slips to the "drop" or "bank". He stated that paper bags and envelopes are the containers commonly used in the transportation of these slips. Furthermore, the unusual hours during which the activities were observed he found to be indicative of the delivery of lottery slips to a "drop" or "bank".

Basing his judgment solely upon the Andaloro affidavit and his own considerable knowledge of illegal lottery operations, Judge Kingfield determined there was probable cause to believe an illegal lottery was in operation (Pa16-17) and issued a warrant for *(inter alia)*:

> ". . . the premises of J.C. Vending Inc., 947 Southard Street, City of Trenton. . . . including the buildings comprising J.C. Vending Inc., which are generally surrounded by the chain link fence or which are accessible from within the fenced area of J.C. Vending property . . . (Pa18)

The J.C. Vending Inc. premises were, as indicated in the warrant, comprised of more than one building. Only

the main building was numbered 947 Southard Street, the company's business address. Hence the initial reference in the Andaloro affidavit to "J.C. Vending Machines, Inc. of 947 Southard Street" (Rat) was more accurate than the description in the warrant. Number 951 was next door to No. 947 and enclosed within the same fence. At the back of No. 951 was a separate, but contiguous building unit of different dimensions, joined to it by a party wall and fronting on the J.C. Vending yard. The back building unit bearing no street address, attached to the front building bearing the address No. 951 Southard, was used, ostensibly for storage, by J.C. Vending.

The front portion of No. 951 was occupied by the Trans World Wig Company. In order to enter the back building from the front of No. 951, it was necessary to go out a side door into the J.C. Vending yard and enter one of the two doors opening onto the yard. Thus the wig company premises were segregated from the back building and the rest of the J.C. Vending premises. The gates to the complex were locked after 4:30 P.M. At night the only way of entering the address less building without breaking into and out of the wig company premises was to enter from the yard adjoining the J.C. Vending premises at No. 947 to which it pertained.

On July 1, 1969, during a raid by state and local police at the J.C. Vending Machine Inc. premises, certain evidence was seized from one of the two contiguous units which bore the No. 951 Southard Street address on the street side. There was no evidence, or allegation that the premises of the wig company, occupying the front building, was entered or searched, or that the garbage disposal, and the intercom system which connected with the main building—No. 947 were not taken from the rear building unit.

The J.C. Vending Inc. premises were owned and occupied by the petitioner and following the raid he was indicted for conspiracy to carry on, and knowingly carrying on a lottery in violation of N.J.S. 2A:121-3 and N.J.S. 2A:112-3.

At a hearing on March 6, 1970, on petitioner's challenge to the description of the premises in the warrant and the adequacy of the affidavit, petitioner and his wife testified regarding the physical positions of the building upon the J.C. Vending Machines Inc. premises, as set forth thereon. No evidence was adduced by either party as to the sufficiency of the warrant. After hearing the testimony and the argument offered on behalf of petitioner, the trial denied petitioner's motion to suppress upon finding that petitioner had failed to produce any evidence that the seized items did not come exclusively from the back unit occupied by J.C. Vending.

At this time, the court granted the State's motion for a reciprocal order under N. J. Rules 3:13-3 (d) to have defendant make available any scientific tests or experiments made upon, or related to the intercom system and the garbage disposal unit, and a list of witnesses petitioner intended to use at trial. Petitioner had already obtained similar discovery from the State. Counsel for petitioner sought denial of such order, at least insofar as it sought a list of witnesses, on the grounds that this violated the privilege against self-incrimination. However, upon the granting of the order, petitioner failed to request a protective order pursuant to Rule 3:13-3 (g) or indicate what in particular would tend to incriminate him. The State acknowledged that it had no hope of obtaining new evidence. It simply wished to impose the burden of continuing disclosure on the petitioner in the event he made new tests on any apparatus (R. 14).

REASONS URGED FOR DENYING THE WRIT

POINT I

New Jersey's pre-trial criminal discovery may not be assailed by a defendant on the ground it violates the right against self-incrimination or to remain silent.

A. The recent decision in *Williams* v. *Florida* is controlling on the question raised in Point Three of the petition regarding the constitutionality of the pre-trial discovery procedure.

Petitioner acknowledged during the course of the hearing on the State's motion for reciprocal discovery (R. 18-19) that there can be no claim of self-incrimination where the State seeks merely to obtain the disclosure of physical things other than evidence of a testimonial or communicative nature obtained from or emanating from the defendant himself. *Schmerber* v. *California*, 384 U. S. 757, 761, 16 L. Ed. 2d 908 (1966). Essentially, the focus of petitioner's objection to the reciprocal discovery by the State under New Jersey Rule 3:13-3 (d) is upon to subparagraph (d) (2) of that provision:

> "(d) *Discovery by the State.* If the court grants discovery or inspection to a defendant
>
> (1) . . .
>
> (2) pursuant to R. 3:3-13 (e), it may condition its order by requiring the defendant to disclose to the prosecuting attorney the names and addresses of those persons known to the defendant, whom he intends to use as witnesses at trial and their written statements, if any."

There is no corresponding provision in Federal Rule 16 from which the New Jersey Rule is derived, although the

Federal Rule does provide for reciprocal discovery of physical evidence.

The order issued was patterned on the form of the rule. Petitioner opposed the granting of the discovery order but failed to move pursuant to R. 3:13-3 (g) (1) for an order to protect himself against the never specified self-incrimination he alleged would flow from his compliance with the order.

Williams v. *Florida*, 399 U. S. 78, 26 L. Ed. 446, (1970) appears to be controlling as to the questions actually raised by the petitioner's submission to reciprocal pre-trial discovery. In *Williams*, the petitioner-defendant was denied, upon his pre-trial motion, a protective order to excuse him from the Florida rule requiring a defendant upon written demand of the prosecuting attorney to give notice in advance of trial if the defendant intends to claim an alibi, and to furnish the prosecuting attorney with information as to the place he claims to have been and the names and addresses of the alibi witnesses he intends to use. He complied with the order and was convicted. Petitioner contended in *Williams* that the rule compelled him, as a defendant in a criminal case, to be a witness against himself in violation of the Fifth Amendment. The Court noted that the notice-of-alibi rule was simply a limited form of pre-trial discovery by the State and quickly disposed of any suggestion that the "discovery" permitted the State deprived petitioner of "due process" or a "fair trial". 399 U. S. at ——, 26 L. Ed. 2d at 449.

More critically the Court rejected the petitioners' contention that he was "compelled to be a witness against himself" by being required to identify the witness he intended to call in his defense, and by enabling the State to obtain

information useful in convicting him, through deposition of the witness. He also unsuccessfully contended that in being required to reveal various elements of his defense, his right to remain silent had been violated. As the Court pointed out in remarks apposite to the instant case:

> "The defendant in a criminal trial is frequently forced to testify himself or to call other witnesses in an effort to reduce the risk of conviction. When he presents his witnesses he must reveal their identity and submit them to cross examination which in itself may prove incriminating or may furnish the State with leads to incriminating rebuttal evidence. That the defendant faces a dilemma demanding a choice between complete silence and presenting a defense has never been thought of as an invasion of the privilege against compelled self-incrimination.
>
> ". . . Response to that kind of pressure [i.e., the need to make choices in developing a trial strategy] by offering evidence or testimony is not compelled self-incrimination transgressing the Fifth and Fourteenth Amendments.
>
> ". . . Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, anymore than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." 399 U. S. at ——, 26 L. Ed. 2d at 451-452.

Thus, the *Williams* decision must be controlling here. Irrespective of the procedural posture of the case or the

label petitioner uses to describe the type of the defense he seeks to secrete, the substance and significance of the requested information which defendant contended in *Williams* would constitute compelled self-incrimination is identical to the gravamen of petitioner's objection to the reciprocal discovery order: submission to the State of the identity of the witnesses he intends to call in his defense and the opportunity to depose them.

The distinction between *Williams* and the instant case on the ground that *Williams* dealt with an affirmative defense or alibi defense is meaningless. While such defenses as alibi, or impotency in rape prosecution are treated procedurally as "affirmative defenses" in modern pleading, they are not common law confessions and avoidances, as a plea of insanity, for example, probably is. As a matter of logic, an alibi can do no more than rebut an inference, developing from the State's case, which would place the defendant at the situs of the crime. By obtaining evidence tending to undermine testimony that defendant was not present, the State seeks to buttress the inference arising from its *prima facie* case that the defendant was present. Cf. 399, U. S. at ——, 26 L. Ed. 2d at 450, 452.

Nor is the susceptibility of alibi situations to surprise a real distinction. As the Court pointed out in *Williams*, the defendant has no constitutional right to "surprise" the State regardless of the nature of his defense; the State can always obtain a continuance at trial on the grounds of surprise as soon as an alibi witness is called, in the absence of the notice-of-alibi rule, and depose the witness. Of course the State can do the same thing, in the absence of a pre-trial discovery rule, in any other case of surprise. See 399 U. S. ——, 26 L. Ed. 2d at 452.

Lastly, *Williams* disposes of the implication in petitioner's concluding statement, that there is anything amiss

insofar as the application of R. 3:13-3 (d) might lead to disclosure on pre-trial of evidence believed at that stage to be exculpatory, which might later prove damaging to his case. As the Court held in *Williams*, there is no constitutional right to be protected from the chance that "the attempted defense ends in catastrophe for the defendant." 399 U. S. at ——, 26 L. Ed. 2d at 451; *State* v. *Angeleri*, 51 N. J. 382, at 384 (1968); *State* v. *Baldwin*, 47 N. J. 379, 388 (1966), *cert. denied*, 385 U. S. 980, 17 L. Ed. 2d 442 (1966).

B. Even were *Williams* not controlling here, New Jersey's form of reciprocal discovery of witnesses intended to be called at trial, if not all forms of reciprocal discovery, is constitutionally unassailable.

Assuming, *arguendo*, *Williams* were not found to be controlling on the issue of pretrial discovery in this case it appears that the only decision the petitioner could marshal to lend any support to his contentions in Point Three is an isolated district court decision, *United States* v. *Fratello*, 44 F. R. D. 444 (S. D. N. Y. 1968) which is not directly on point. The decision in *Brady* v. *Maryland*, 373 U. S. 83, 10 L. Ed. 2d 215 (1963), is inapposite to the purported issues here. *Brady* holds only that the requirements of "due process" impose a *duty on the prosecutor* to disclose evidence material to guilt or punishment. It does not give the defendant a constitutional right to forage through the prosecution evidence in an effort to elicit any evidence that may assist his defense. Just as petitioner has failed to specify what in particular of the evidence in his possession may possibly incriminate him, he has given no indication of, nor is there any reason to believe that the States possesses exculpatory evidence. Hence, at this stage of the proceedings, the State is aware of

absolutely nothing that it would be required to disclose to the petitioner, independent of this requests pursuant to R. 3:13-3 (a), (b) and (c).

Fratello was concerned only with discovery of those business records of defendants they intended to use at trial in an income tax prosecution based in large part upon incriminating evidence contained in documents purloined from defendants' files by their former accountant, who was to be a government witness. The only available copies of these documents were alleged to be in the sole possession of the government. The court acknowledged that *Schmerber* v. *California*, *supra* foreclosed the raising of the privilege question with regard to "oral or physical" evidence. 44 F. R. D. at 450. However, the Court felt even if the personal records, books and papers of the defendant might be evidence of such a character, considerations of fairness, protection of property rights (e.g. *Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524 (1886) and public policy (44 F. R. D. 450-451) dictated that the court, in exercising the discretion it held under Rule 16 (e) deny discovery. As the court itself indicated, *Fratello* should be closely limited to its peculiar facts. It offers no guidance on the question of whether a requirement that a defendant furnish the State with a list of witnesses he intends to call at trial and their statements ever involves compulsion of communicative or testimonial evidence from the defendant.

In the proceedings below, the State placed heavy reliance upon Justice Traynor's decision in *Jones* v. *Superior Court*, 58 Cal. 2d 56, 372 P. 2d 919, 22 Cal. Rptr. 879 (1962), sustaining an order granting a prosecution request for discovery of the witnesses that the defendant in a rape case intended to call in regard in his defense of impotency, and any reports they may have prepared regarding defendant's alleged condition. The State is frank to

admit that in a penetrating decision, *Prudhomme* v. *Superior Court*, 2 Cal. 3d 320, 85 Cal. Rptr. 129, 466 P. 2d 673, the California Supreme Court has substantially limited the force of the *Jones* decision.

However, an examination of the mechanics of the *Prudhomme* decision merely fortifies the conclusion that the constitutional questions arising under the California procedure, which impelled the Califronia court in *Prudhomme* to burden pre-trial discovery by the State with certain restraints, would be moot in the context of New Jersey discovery procedure. The New Jersey rule, on it's face, is not susceptible to the objections raised in *Prudhomme*.

At the matrix of the court's decision in *Prudhomme* was the axiom that in determining the scope of pre-trial discovery by the prosecution—

> ". . . [the] defendant must be given the same right as an ordinary witness to show that disclosure of *particular* information could incriminate her." 2 Cal. 3d at 326. (Emphasis supplied.)

The court found that the trial court's order compelling the disclosure to the prosecution of the names, addresses and *expected testimony* of the witnesses defendant intended to call was defective in its failure to afford defendant this right, or even inquire into the incriminatory nature of the *particular* information sought. However, the Court took pains to point out that:

> "We do not intend to suggest that the prosecution should be barred from *any* discovery in this or any other case. A reasonable demand for factual information which, as in *Jones*, pertains to a particular defense or defenses, and seeks only that information which defendant intends to introduce at trial,

> may present no substantial hazards of self-incrimination and therefore justify the trial judge in determining that under the facts and circumstances in the case before him, it clearly appears that disclosure cannot possibly tend to incriminate." 2 Cal. 3d at 327. (Emphasis supplied by the Court.)

The thrust of *Prudhomme* is that procedures for pre-trial identity and statements of witnesses must submit to the effective exercise of the defendant's right to demonstrate that the disclosure of particular, i.e., specific information could tend to incriminate him. New Jersey's pre-trial discovery procedure, unlike California's, explicitly provides for this exercise by incorporation of the protective order mechanism:

> "Upon motion and for good cause shown the court may at *any time* order that the discovery or inspection sought pursuant to R. 3:13-3 (b) (c) or (d) be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the Court may consider the following: . . . *protection of confidential* relationships and privileges recognized by law: . . ." R. 3:13-3 (g) (1) (Emphasis supplied.)

If at any time in the course of the present proceedings, it should appear that petitioner's constitutional right against self-incrimination was being violated as a result of particular information obtained by the State on discovery, the trial court would presumably bar such evidence from being presented at trial, pursuant to this provision. However, in the instant case, petitioner has yet to seek such a protective order, indicate the particular information he deems incriminatory, or in any other way attempt to demonstrate how *he* will be prejudiced in this

matter by complying with the order. When he presents actual, rather than speculative grounds for such an objection, his motion will be cognizable. Parenthetically we note that the lack of finality of the order from which petitioner seeks review is underscored by the provision in R. 3:13-3 (g) (1) allowing prophylactic relief to be granted at *any time* in the proceeding, upon the requisite showing being made.

The New Jersey pre-trial discovery procedure incorporates an adequate remedy to protect petitioner's constitutional right against self-incrimination and must be judged constitutional on its face.

POINT II

The basis upon which the warrant to search was issued met pertinent constitutional standards for probable cause.

Petitioner's attempt to attack the sufficiency of the basis upon which Judge Kingfield found probable cause to exist is mis-directed. To the extent that constitutional standards regarding the sufficiency of the basis for the warrant are pertinent, the Court's decision in *United States* v. *Ventresca*, 380 U. S. 102, 13 L. Ed. 2d 684 (1965), is dispositive of any questions which may be raised with regard to sufficiency of the affidavit as a basis for the warrant and is controlling here. Moreover, to the extent that the Court's decision in *Spinelli* v. *United States*, 393 U. S. 410, 21 L. Ed. 2d 637 (1968), is germaine to the instant case, the application for warrant was clearly adequate.

The affidavit in this case is *not even susceptible* to any of the objections against which the sufficiency of the

affidavit in *Ventresca* was upheld. As the Court reiterated in *Ventresca*, ". . . [an] affidavit based on hearsay will be sufficient, so long as there [is] substantial basis for crediting the hearsay . . ." 380 U. S. at 108. In the instant case, unlike *Ventresca*, the information recited in the affidavit did not come merely from unidentified investigators; rather it was precisely identified as the personal observation of the affiant and two of his fellow State Police officers who were named and identified as detectives. Moreover, the affiant and his colleagues interchanged assignments during the course of the surveillance. Consequently, the affiant, an experienced police investigator who had conducted numerous lottery investigations, was able to confirm by personal observation, the same array of activities involved in the *modus operandi* of the lottery operation, that was observed by his colleagues on other occasions. The affiant had personal knowledge of all the activities he cited as indicia of what, from his and Judge Kingfield's long experience, appeared to be a typical lottery operation (Pa6, 12, 14, 16). The affiant's recital far exceeded that which was constitutionally required in this regard inasmuch as:

> "Observations of fellow officers of the government engaged in a common investigation are plainly reliable basis for a warrant applied for by one of their number." 380 U. S. at 111.

Petitioner's invocation of the informer question is totally inapposite. The injunctions in *Aguilar* v. *Texas*, 378 U. S. 108, 12 L. Ed. 2d 723 (1964) and *Spinelli* v. *United States*, *supra*, regarding the use of informer information has no bearing whatsoever on the sufficiency of the affidavit in the instant case. Such warrant adumbrated personal observations of experienced police investigators obtained during a complete independent in-

vestigation which encompassed and ascertained far more than the substance of the original and later "tips". Any information in the affidavit identified as originating from the confidential informant was independently confirmed and amplified by the personal observations of the officers. The "tips" supplied by the confidential informant were nothing more than the moving force for the initiation for the investigation. Observations made in the course of the investigation provided the impetus for continuing it. The results of the investigation, including the inferences set forth therein, wholly independent of any "tips", would have sufficed as the basis for the warrant application. *United States* v. *Ventresca, supra.*

In *Spinelli*, the Court found as the fatal defect in the warrant application, that an item detailing the informer's tip had a "fundamental place" in the warrant application. Indeed it was the linch-pin of the affidavit without which probable cause could not be garnered from the array of equivocal, or seemingly innocous information gathered during the FBI investigation. 393 U. S. at 414. In the instant case, the informant's tip was mentioned only as background to the commencement of the investigation.

The inferences upon which probable cause was predicated were in the first instance the product of the affiant's own thought process, based upon his experience and training, and were duplicated by an experienced judge of the New Jersey Superior Court. Indeed, the thought processes of the issuing judge may have been even more rigorous than a simple consideration of the activities described. As stated by the trial court:

> "I don't know of any activity which is legal which could be conducted in the manner that the activities which are described in this affidavit could be con-

> ducted, but I suppose that it is entirely possible that people would travel from spot to spot as was indicated here and then after obtaining certain things in paper bags, ride by without stopping and throwing them out the window and have someone come from behind a chain link fence and pick them up and take them inside, but it is certainly a factor which should be considered in arguing the overall affidavit." (Pa15)

Moreover, in every other material respect beyond the critical fact that the informant's information was not essential to the finding of probable cause, the affidavit in the instant case is adequate, where the affidavit in *Spinelli* was subjected to criticism. Thus, while in *Spinelli*, there was nothing in the affidavit beyond the "bald" statements of the FBI agent to support the proposition that the defendant was a "gambler", 393 U. S. at 414, all of the persons identified by name during the course of the surveillance here were checked for previous criminal records through the State Bureau of Investigation. These inquiries disclosed that the subjects identified as Horace L. Shivers, Philip Ventigli and John O. Mapp had arrest records relating to lottery violations and that Charles Clark had been arrested for grand larceny. This documented information *could be probative* in weighing the inferences drawn from the officers' observations. *Nathanson* v. *United States*, 290 U. S. 41, 46, 78 L. Ed. 159, 161 (1933).

In regard to the documentation of the accused's criminal activities and propensities, the Court in *Spinelli* required of informant's tips as a basis for the warrant, only that they be described—

> ". . . in sufficient detail that the magistrate may know he is relying on something more substan-

> tial than a causal rumor circulating in the under world or an accusation based merely on an individual's general reputation." 393 U. S. at 416.

A fortiori, when an experienced issuing judge relied upon information from the State Bureau of Investigation offered by police officers, detailing arrests, the standard was met.

Only the absence of an adequate recital of the underlying facts of the instant case in the petition, in contrast to some other fantasized case that the petitioner would prefer to defend, lends an air of reasonableness to his attempt to present questions to the Court regarding the sufficiency of the warrant. It is respectfully submitted that the Court should not entertain further discussion on the question denominated in the petition as "Point One".

POINT III

The search which elicited the evidence sought to be suppressed was conducted pursuant to, and in conformance with a search warrant describing the place to be searched with sufficient particularity.

New Jersey Court Rule 3:5-7 (d) provides that no search or seizure conducted in good faith under a search warrant —

> "shall be deemed unlawful because of irregularities in the warrant or in the papers or proceeding to obtain it, or in its execution . . ."

There has been no allegation that the search and seizure conducted on July 1, 1969 upon the premises of J. C. Vending Machine, Inc. was conducted in bad faith.

However, the petitioner maintains that the search was improper because it is his contention that the locus of the numberless building unit from which the seized items were taken was actually No. 951 Southard Street. Although this unit was linked by the seized intercom system with the rest of the main part of the premises of J. C. Vending Company, Inc. of 947 Southard Street, Trenton, and was immediately accessible from the rest of the building forming the J. C. Vending complex but not from the separate, unconnected, but contiguous building occupied by the Trans World Wig Company bearing No. 951 on the street side, he contends that it should be considered as forming a part of a separate premises with the building fronting on the street and bearing the No. 951, rather than as part of—

> "the premises of J. C. Vending Inc., 947 Southard Street, City of Trenton, County of Mercer, State of New Jersey, including the buildings comprising J. C. Vending Inc., which are generally surrounded by the chain link fence or which are accessible from within the fenced area of the J. C. Vending Corp. . . ." (Pa18)

The actual facts regarding positional relationships of the various buildings upon the J. C. Vending premises, which petitioner studiously avoids setting forth in the petition, make it evident that in actuality, the warrant was probably more accurate in delimiting the area to be searched, to include the numberless building adjoining No. 951 Southard Street which enjoyed direct entry into the J. C. Vending premises, but not the wig company premises, than a warrant simply authorizing a search of the premises at No. 951 Southard would have been. (*E.g.*, testimony of defendant Costello, R. 94-104.) In stating

that none of the suspicious conduct was observed "in or around No. 951", petitioner is correct only insofar as the affidavit did not allege that any suspicious activity was observed within the front building occupied by the wig company bearing the No. 951 address. Considerable activity was observed in the yard adjoining the back building. Indeed, from the four corners of the affidavit, it is clear that such portions of the fenced in area not used by the J. C. Vending Corp. were to be excluded from the search, irrespective of the numbers they might bear.

As disclosed by the petitioner's own testimony, it is incorrect to refer, as the petitioner does, to both the front unit at No. 951 Southard and the unconnected, contiguous unit fronting on the J. C. Vending yard as a single building unit (R. 125). Thus it is doubtful whether recourse need be made to New Jersey Rule 3:5-7 (d) to uphold the validity of this warrant.

Even assuming *arguendo*, that the locus of the seized items should more properly have been designated as No. 951 Southard Street, there was no error in upholding the search after a full hearing upon defendant's Motion to Suppress. As stated by the Supreme Court of New Jersey in disposing of a closely related question in *State* v. *Daniels*, 46 N. J. 428 (1966):

> "The test is not whether the description is completely accurate in every detail but rather whether it furnishes a sufficient basis for identification of the property so that it is recognizable from other adjoining and neighboring properties. United States v. Pisano, 191 F. Supp. 861 (S. D. N. Y. 1961)." 46 N. J. at 437.

In remarks that furnish guidance in the instant case, the New Jersey Supreme Court there concluded:

> "The *designation of the street number might well here be regarded as superfluous.* See United States v. Contee, F. Supp. 26 (D. C. 1959). An officer could not only have with reasonable effort, identified the premises commanded to be searched, but *would not with this warrant have been justified in searching any other premises in the block* . . . We do not mean to be understood to say generally that the personal knowledge of the officer executing the warrant of the place to be searched, could cure a vitally deficient description, but merely, where as here, the error is at the worst innocent and technical, and *there is additional descriptive language which properly identifies the place, such knowledge is an element to be considered. The building to be searched was identified by far more significant language than the street number.* In the light of the foregoing, the error fades into comparative insignificance." 46 N. J. at 438. (Emphasis supplied)

The controlling test for determining the sufficiency of the description of the premises continues to be whether armed with the description incorporated in the warrant, the officer can, with reasonable effort, ascertain and identify the place intended to be searched. *Steele v. United States*, 267 U. S. 498, 503, 45 S. Ct. 414, 69 L. Ed. 757 (1924). It is respectfully submitted that the warrant in the instant case met this requirement and no viable constitutional question can be raised regarding the execution of the search and seizure.

CONCLUSION

For the foregoing reasons respondent respectfully submits that certiorari should be denied in the matter of the instant petition.

Respectfully submitted,

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey
Attorney for Respondent.

MICHAEL R. PERLE,
Deputy Attorney General,
Of Counsel and on the Brief.

APPENDIX

Affidavit of Andrew Andaloro

APPLICATION FOR SEARCH WARRANT

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } ss.:

On this 30th day of June, 1969, before me the undersigned Judge of the Superior Court, State of New Jersey, personally appeared Investigator Andrew Andaloro of the New Jersey State Police, who being duly sworn on his oath according to law says:

1. I make this affidavit in the performance of my duties as a law enforcement officer of the State of New Jersey. My office is at the New Jersey State Police Hightstown Station, in the Township of East Windsor, County of Mercer, State of New Jersey.

2. I have good reason to believe and do believe that in and upon certain premises within the City of Trenton, County of Mercer, State of New Jersey, known as J. C. Vending Machines Inc. of 947 Southard Street, and more particularly described as a two story yellow brick building bearing a sign on the front "J.C. Vending Machines Inc." also painted on the front wall beneath are the words "Ice Cream, Coffee, Drinks, candy, cigarettes, cigars, music, games, etc.". The front of the first floor has a large glass display type windows, with an entrance door to the right of the windows. The second level on the front has three pair of double mullion windows and a large picture

window. The rear and side area of the building is of concrete or cinder block construction containing numerous overhead garage doors. The area surrounding the main two story building is blacktop coated. The area edging the black top is generally surrounded by a chain-link fence in between the areas not covered by adjacent buildings. This somewhat rectangular area is bordered on the north by Southard Street and on the south by Trent Street. On the Trent Street side is a yellow concrete or cinder block garage type building which fronts three garage type doors onto Trent Street, and at least one garage type door leading into the property. At the left side of the blacktopped area also fronting onto Southard Street, is another two story building of similar yellow brick and yellow concrete or cinder block construction. The front of this building borders the sidewalk area on Southard Street with the windows on the low level boarded over. At the side the chain-link fence connects to the building. Within the fenced in area are two garage doors leading into the blacktopped area of JC Vending Inc., being occupied by one Charles Hunter Clark, approximately 40 years, 6'0", light skinned colored male, moustache, there has been and is now being conducted the illegal practice commonly known as lottery in violation of 2A:121-3 of the laws of the State of New Jersey, also involved in this illegal operation of lottery in violation of 2A:121-3 of the laws of the State of New Jersey is the premise known as 13 Grant Avenue, within the City of Trenton, and more particularly described as a three story red brick building, with stairway leading to the entrance which protrudes onto the sidewalk and face North Clinton Avenue with a green door bearing number 13 and a chrome colored kick plate at the bottom, with a small porch bordered with iron rail and a

white aluminum type awning over this porch, with double mullion window to the right of the entrance way and in particular the apartment to the right of the entrance door occupied by unknown persons; and also involved in this illegal operation of lottery are the following persons: Horace Shivers operator of a 1960 Rambler station wagon N. J. registratoin NXW-692 and owner-operator of a 1959 yellow Cadillac convertible N. J. registration LBJ-707; John Doe described as 6'0", 220 lbs., dark skinned colored male, approx. 55 years of age; Jane Doe described as 5'3", 170 lbs. dark skinned colored female, 50 years of age.

3. The facts tending to establish the grounds for this application and the probable cause of my belief that such grounds exist are as follows:

a. On April 24, 1969 a confidential informant, who has given information that has proved reliable in the past, advised that a lottery operation was being conducted in the City of Trenton in the following manner: Horace L. Shivers, a colored male, who operates a 1960 Rambler station wagon, color black and white and a 1959 Cadillac convertible, color yellow, picks up lottery bets at various places in the City of Trenton including Federated Metals Division of American Smelting and Refining, Enterprise Ave., Trenton and a residence at 13 Grant Ave., Trenton, and delivers these lottery bets to either Philip Ventigli at his home on Princeton Ave., or to J. C. Vending Corp., Southard Avenue, Trenton, New Jersey.

b. A check with the State Bureau of Identification reflected that Hórace Lee Shivers, colored male, age 31, was arrested on April 27, 1965 for possession of slips and engaging as a messenger for a lottery.

Affidavit of Andrew Andaloro

State Bureau of Identificatoin records also reflect that Philip Anthony Ventigli was arrested on March 29, 1954 for possession of Lottery Paraphernalia.

c. On Friday, April 25, 1969, while conducting a surveillance adjacent to the Federated Metals factory, Enterprize Ave., I made the following observations: At approximately 1:50 PM a 1960 Rambler station wagon, color black and white with chrome roof rack bearing New Jersey registration NXW-692, operated by a colored male, stopped at the gate in front of Federated Metals. An unknown colored male described as being approximately 6'0", 220 lbs., approximately 55 years of age, wearing work coveralls and a skull cap came out of the gate and approached the Rambler. I observed this man take an envelope from his right coverall pocket and give the envelope to the colored male sitting in the Rambler. I followed the Rambler as it left Enterprize Ave., to Grant Ave., where the colored male operator parked his Rambler and entered the premise of 13 Grant Ave., hereinbefore described, at approximately 2:10 P.M. This colored male is described as being approximately 6'0", 180 lbs., 30 years of age, wearing goatee and moustache, black hair in high pompadour style, sports clothes. At approximately 2:20 PM the colored male left 13 Grant Avenue and returned to his Rambler. I observed this person carrying a manila colored envelope in his right hand as he proceeded to his vehicle. I followed the Rambler as it left Grant Avenue, to Pennington Avenue where the operator parked his Rambler adjacent to a three story brick apartment house. The colored male left the Rambler and approached a doorway bearing No. 76, knocked on the door, and a colored female, described as approximately 5'3", 170 lbs., 50 years of age, exited the building from this door and I observed this

woman give the colored male a brown paper bag. The colored male returned to the Rambler and proceeded on Pennington Ave., to Calhoun Street and continued onto Princeton Ave. to Stout Avenue and turned left. After turning onto Stout the Rambler proceeded a short distance, and turned left into an alley behind the homes and businesses facing Princeton Ave., (odd numbered buildings), at approximately 2:28 PM. Moments later the Rambler was observed at the intersection of Heath and Princeton Avenues. Heath Ave., being the Avenue running parallel to Stout Avenue. At this time surveillance and tail was discontinued.

Records of the New Jersey Motor Vehicle Bureau reflect that NXW-692 is registered to Walter O. Shivers of 41 Tyrell Ave., Trenton on a 1960 Rambler Station Wagon, color black and white.

Also this date, I proceeded to the State Bureau of Identification and secured a photograph of Horace Shivers and positively identified the occupant of the Rambler as being the same person.

d. On Monday, April 28, 1969, Detective W. Decker of the New Jersey State Police, conducted a surveillance of the Federated Metals factory, Enterprise Ave. and made the following observations: At approximately 1:55 PM the 1960 Rambler operated by Shivers arrived at the gate in front of Federated Metals. An unknown colored male, previously described approached the Rambler from the factory and handed Shivers a white envelope which he took from his right coverall pocket. Shivers then drove off.

On this date, Detective A. DeMasi, also of the New Jersey State Police, conducted a surveillance of 13 Grant Ave-

nue between the hours of 1:40 PM and 2:25 PM. During the period of surveillance Det. DeMasi observed 12 colored males, 2 colored females and 1 white female enter the premise between 1:40 PM and 2:00 PM. These persons entered the premise and exited moments later on each occasion. On each occasion entry was gained by these persons by rapping on the 1st floor window and then waiting at the door until an unknown person opened the door from the inside. One colored male operating a 1964 Pontiac, color black, bearing New Jersey registration LNS-238 existed his vehicle carrying a white envelope in his right hand. This colored male, described as being approx. 55 years of age, 6'0", 220 pounds, approached the porch, rapped on the window, and waited by the door until an unknown colored male opened the door and took the white envelope from the operator of the Pontiac. The operator of the Pontiac then returned to his vehicle and drove off. At approx. 2:15 PM, the colored male identified as Horace Shivers operating the 1960 Rambler arrived and parked adjacent to 13 Grant Ave., and entered the building empty handed, using the same procedure as the aforementioned persons. At approximately 2:20 PM, Shivers exited the building carrying a while envelope in his right hand. As he approached his vehicle he threw the envelope into the opened window by the drivers door onto the front seat of the Rambler.

Records of the New Jersey Motor Vehicle Bureau reflect that LNS-238, 1964 Pontiac, color black, is registered to a John O. Mapp of 353½ Resivour, Trenton, New Jersey. Records of the State Bureau of Identification reflect that John O. Mapp has a record of numerous arrests for possession of lottery slips.

Affidavit of Andrew Andaloro

On this date, I conducted a surveillance of the intersection of Stout Avenue and Princeton Avenue. At approximately 2:30 PM I observed Shivers, operating the Rambler driving north on Princeton Ave. past the intersection of Heath Ave. and he turned left onto Stout Ave. Moments later I observed Shivers and the rambler turn onto Heath Ave. from the alley previously mentioned which intersects Stout and Heath Avenues and runs parallel with Princeton Avenue behind the buildings facing Princeton Avenue. Shivers contained across Princeton on Heath Ave. Moments later a 1968 Buick bearing New Jersey registration HSH-395 with a white male operator, exited the alley onto Heath Ave. and turned South onto Princeton Ave.

Records of the New Jersey Motor Vehicle Bureau reflect HSH-395 is registered to Francis Ventigli, 1415 Princeton Ave., Trenton, New Jersey on a 1968 Buick, color green.

e. On Tuesday, April 29, 1969, Det. Decker continued surveillance of Federated Metals, Enterprize Ave., and Shivers again met the colored male in coveralls who was observed giving Shivers a white envelope, at approx. 2:05 PM.

This date, Det. DeMasi continued surveillance of 13 Grant Avenue between the hours of 1:40 PM and 2:20 PM. During this period 12 colored males, 2 colored females and 1 white female were observed entering the premise in the same manner as described in surveillance of April 28, 1969. Shivers arrived at approximately 2:15 PM, entered the premise empty handed and exited shortly thereafter carrying a white envelope.

Affidavit of Andrew Andaloro

This date, I conducted a surveillance of the alley intersecting Stout and Heath Avenues and running parallel to Princeton Avenue. It is noted that the alley runs directly behind 1415 Princeton Ave., the residence of Philip and Frances Ventigli. At approximately 2:25 PM Shivers in the Rambler entered the alley from Stout Avenue. Shivers stopped his vehicle in the alley adjacent to the Ventigli vehicle parked behind 1415 Princeton Ave. A white male described as 5'11", 200 pounds, 45-50 years of age, grey hair (balding) wearing glasses and sports clothes approached Shivers vehicle from the Ventigli yard and Shivers handed this white male brown paper bag through the opened car window. Shivers drove off, entering Heath Avenue crossing Princeton Avenue. Moments later the white male who had taken the bag from Shivers backed the 1968 Buick previously mentioned into the alley from the yard and drove into Heath Ave., and turned South on Princeton Ave. at approximately 2:29 PM.

f. On Wednesday, April 30, 1969 Det. DeMasi continued surveillance of 13 Grant Ave., Between the hours of 1:40 PM and 2:20 PM. During this period approx. 15 persons entered the premise in the same manner previously described including the operator of the 1964 black Pontiac registered to J. Mapp. Shivers arrived at the premise at approx. 2:15 PM and left at approx. 2:20 PM.

This date, I continued a surveillance of the alley intersecting Stout and Heath Avenues. At approximately 2:30 PM Shivers pulled into the alley stopped adjacent to Ventigli's yard and the aforementioned white male with grey hair approached Shivers Rambler. Shivers gave the white male a brown bag and left the alley. The white male left the alley in the 1968 green Buick and turned south on Princeton Ave., at approx. 2:32 PM.

Affidavit of Andrew Andaloro

This date, Det. Decker conducted a surveillance and tail of Ventigli's vehicle as it turned onto Princeton Ave. The green Buick continued south on Princeton Ave. to Calhoun Street and then turned onto Calhoun street continuing in a southerly direction. The Buick turned left onto Trent Street. As the Buick was moving adjacent to the chain link fence located at the rear of JC Vending Inc. property, Det. Decker observed the white male occupant of the green Buick throw a brown paper bag from the open window of the vehicle onto the side walk along the JC Vending fence. A colored male described as being approx. 6'0", 40 years of age, light skinned black hair, wearing a moustache, a beany skull cap, and grey kahki work uniform exited the JC Vending lot through the fence gate and picked the brown paper bag up from the sidewalk and returned into the gate at approx. 2:37 PM.

g. On Friday, May 2, 1969, Detective DeMasi conducted a surveillance of 76 Pennington Ave., Trenton, N.J. and made the following observations: At approx. 2:15 PM a colored female previously described left 76 Pennington Ave. and sat on an abutment of the porch of this premise, holding a brown paper bag. At approx. 2:20 PM Shivers operating the Rambler approached the premise on Pennington Ave. and parked adjacent to the woman sitting on the porch of 76 Pennington Ave. Shivers left his vehicle and approached the woman who then gave Shivers the brown paper bag. Shivers returned to his vehicle and after entering was observed places an unknown amount of white and manila colored envelopes into the paper bag he had received from the woman, and then Shivers drove off on Pennington Ave. towards Calhoun Street.

This date, I continued surveillance of the alley intersecting Stout and Heath Avenues. At approximately 2:29

PM Shivers pulled into the alley, stopped adjacent to Ventigli's yard and the aforementioned white male with grey hair approached Shivers' Rambler. Shivers again gave this person a brown bag and left the alley. The white male left the alley shortly thereafter and turned south on Princeton Ave. from Heath Ave. at approx. 2:31 PM.

Det. Decker conducted a surveillance of Trent Street adjacent to the J C Vending Corp. rear gate and made the following observations: At approx. 2:36 PM the 1968 green Buick with a while male operator entered Trent Street from Princeton Ave. and as the Buick was moving adjacent to the chain link fence of J C Vending the white male occupant threw a brown paper bag from the open window of his vehicle onto the side walk along the fence. The colored male previously described wearing grey kakhi uniform exited the fence through the gate and picked the bag up off the sidewalk and walked to the yellow garage attached to the fence located on the extreme east end of the JC Vending fenced property facing Trent Street. The colored male entered the garage through the last garage door at the east wall of this building.

h. On Monday, May 5 and Wednesday May 7, 1969 I conducted surveillance of the alley located behind the Ventigli residence. On each occasion, Shivers gave a brown paper bag to the white male previously described between 2:25 PM and 2:30 P.M. The white male then left the alley on each day in the green Buick driving south on Princeton Ave.

On both of the above mentioned days Det. Decker conducted surveillances of Trent Street adjacent to the J C Vending Corp. rear gate, and between the hours of 2:30 PM and 2:35 PM observed the white male occupant throw

a brown paper bag onto the walk bordering the J C Vending property and the colored male in grey kahki pick the bag up and carry the bag into the garage aforementioned.

i. On Thursday, May 8, 1969, I continued surveillance of the alley intersecting Stout and Heath Avenues behind Princeton Ave. On this date Shivers and the white male were not observed.

On this date, Det. Decker made the following observation while conducting a surveillance of Trent Street adjacent to J C Vending gate and fence: At approximately 2:30 PM Shivers operating the Rambler station wagon turned into Trent St. from Princeton Ave. and threw a brown paper bag onto the sidewalk which was retrieved by the colored male wearing grey kahki clothes who carried the bag into the end garage door as previously described.

j. On Tuesday, May 13, 1969 I conducted a surveillance of J C Vending from Trent Street. At approximately 2:27 PM Shivers, operating a yellow cadillac convertible bearing New Jersey registration LBJ-707 turned into Trent St. from Princeton Ave. and threw a brown paper bag onto the sidewalk which was retrieved by the colored male, who carried the bag into the garage through the last door adjacent to the east wall of the building.

Records of the New Jersey Motor Vehicle Bureau reflect that LBJ-707 is registered to Horace L. Shivers of 41 Tyrell Ave., Trenton, N. J. on a 1959 Cadillac convertible.

k. On May 14, 1969 a confidential informant, who has given information that has proved reliable in the past, ad-

vised me that J C Vending is the drop for numbers bets in the Trenton area, and J C Vending drivers and the corporations commercial vehicles are utilized as pickup men in and around the Trenton area. The drivers pick up numbers bets and return to the J C Vending Corp. between 2:00 PM and 3:00 PM daily with the bets.

This date, Det. DeMasi and I conducted a surveillance of the J C Vending Corps main entrance, yard, and secondary buildings located on Southard Street. Between the hours of 2:00 PM and 2:30 PM 3 green delivery vans bearing J C advertising entered the yard. The vehicles parked against the fence at the west side of the property and the drivers carried bags into the secondary entrance of the main building. At approx. 2:25 PM the colored male previously described exited the main building from the secondary exit and he proceeded to the rear of the property to the fence bordering Trent St. This colored male stood by the fence bordering Trent until a yellow cadillac convertible passed the gate and the operater threw something from the vehicle. He then left the property and picked up the object thrown from the vehicle and walked to the garage he had entered on previous days of surveillance. A short time later this colored male was observed approaching the main building through the yard carrying a brown paper bag folded tightly in his right hand and he entered the main building through the secondary entrance. At approximately 2:45 PM a blue sedan and two green delivery vans bearing J C advertising entered the yard and all three drivers exited their vehicles carrying paper bags and packages brown in color and entered the secondary entrance of the main building. At approx. 2:55 PM the colored male in grey kahki left the building carrying a large brown bag and entered the garage section

to the rear and adjacent to the main building. At approximately 2:58 PM a 1964 Buick, color grey and black bearing N. J. registration LAD-572 entered the yard. A white male exited the vehicle and was recognized by me to be the same person observed on earlier dates who had met Shivers at 1415 Princeton Ave. in the rear alley and who had thrown the bag against the fence at J C Vending on various earlier dates. This person had a small brown bag in his right hand folded tightly. As he approached the main building the colored male in grey kahki left the garage section and met the white male. The white male and colored male walked together into the main building. Moments later the white male left the main building and drove off in his vehicle. At approximately 3:15 PM the colored male left the main building carrying a small brown bag in his hand, and he entered the garage section to the rear and adjacent to the main building. At 3:22 PM the colored male left the garage carrying a large brown bag in his right arm and several small bags in his left hand. This person walked around the main building and entered the large two story building (with boarded windows on first level) east of the main building through one of two garage doors accessible from the yard.

Records of the New Jersey Motor Vehicle Bureau reflect that LAD-572 is registered to Frances Ventigli of 1415 Princeton Ave., Trenton, N. J.

1. On May 15, 16, 1969 I conducted surveillance of J C Vending Corp. rear fence from Trent Street. On each occasion between 2:25 PM and 2:30 PM I observed Shivers throw the bag from his yellow cadillac and each time the brown bag was retrieved by the colored male previously described who carried the bag into the garage in the same manner mentioned previously.

Affidavit of Andrew Andaloro

On May 16, 1969 I continued the surveillance until 4:40 PM when the colored male was observed leaving the J C Vending property through the rear gate and locking the gate as he left. This person entered a grey 1963 Cadillac bearing New Jersey registration MIL 582 and drove off.

Records of the New Jersey Motor Vehicle Bureau reflect MIL 582 is registered to Charles Hunter Clark of 323 Walnut St., Trenton, N. J., on a 1963 blue cadillac 2 door sedan. The records reflect Clark's employment as J C Vending Corp., 947 Southard St., Trenton, N. J.

Regords of the State Bureau of Identification reflect that Charles Clark had previously been arrested for Grand Larceny.

m. On June 24, 25, 26, 27, 1969 surveillances by Det. Decker, Det. DeMasi and I indicated the following:

On each of the above mentioned dates Det. Decker conducted surveillance of the Federated Metals factory, Enterprize Ave., Trenton, N. J. On each day, Shivers operating the 1959 yellow cadillac bearing N. J. registration LBJ 707 arrived at the factory gate between 1:55 PM and 2:10 PM and the unknown colored male, wearing coveralls (previously described) approached Shivers and handed Shivers an envelope.

On June 24, 25, 27, 1969 Det. DeMasi conducted surveillances at 13 Grant Avenue, Trenton, N. J. and observed numerous persons entering the premises in the manner previously described. Each day between 2:05 PM and 2:20 PM Shivers entered this premise in the same manner, and left carrying papers or envelopes.

On June 26, 1969 Det. DeMasi conducted a surveillance of 76 Pennington Ave., Trenton, N. J. and the colored

female previously described sat on her porch until 2:25 PM when Shivers arrived operating the 1959 yellow cadillac, Shivers left his vehicle and approached the woman who gave him a brown paper bag. Shivers returned to his vehicle and drove off towards Calhoun Street.

On each of the aforementioned dates, I conducted surveillances of Trent Street adjacent to the J C Vending Corp. rear gate and between the hours of 2:25 PM and 2:30 PM I observed Shivers in the yellow cadillac throw a brown paper bag from his vehicle towards the J C Vending gate. On each occasion the colored male wearing grey kahki (previously described) retreived the bag and carried the bag into the J C Vending property.

I have been a police officer for five years and during this time I have conducted numerous gambling investigations of this type. In my previous experience as a police officer, I have observed lottery operations of this type to be generally conducted in a similar manner. Bets received by the writers are recorded on slips of paper which are retained by the writer until they are turned over to a collection man usually called a runner who after gathering slips from the writers transports all of the slips to the drop or bank. Paper bags, and envelopes are common containers used in the transaction of these slips. The hours of surveillance of the aforementioned persons transporting and delivering paper bags and envelopes are indicative of the unusual hours of delivery of the slips to the bank or drop.

4. Wherefore, I respectfully move that a search warrant be issued authorizing a search of: The premises of J C Vending Corp., 947 Southard Street, City of Trenton, County of Mercer, State of New Jersey, to include the

buildings comprising J C Vending Corp. which are generally surrounded by the chain link fence or which are accessible from within the fenced areas as hereinbefore described and the vehicles registered to the J C Vending Corp. which may be found on the premises of the J C Vending Corp., 947 Southard St., Trenton, N. J.; the person of Charles Hunter Clark hereinbefore described on the public street of Trenton in the premises of J C Vending Corp.; the first floor apartment to the right of the entrance of 13 Grant Avenue, City of Trenton, County of Mercer, State of New Jersey; the person of Horace Shivers hereinbefore described and the 1960 Rambler color black and white N. J. registration NZW-692 and the 1959 Cadillac convertible color yellow N. J. registration LBJ-707 or any other vehicle Shivers may be operating on the public streets of Enterprize Ave., Grant Ave., Pennington Ave., Calhoun St., Princeton Ave., or Trent St., all in the City of Trenton, County of Mercer, State of New Jersey; the person of John Doe, described as colored male, 6'0", 220 lbs., approx. 55 years of age, wearing coveralls and skull cap on the public street of Enterprize Ave., City of Trenton, County of Mercer, State of New Jersey; the person of Jane Doe hereinbefore described as a colored female, 5'3", 170 lbs., approx. 50 years of age, on the public street of Pennington Ave., or the porch of 76 Pennington Ave., City of Trenton, County of Mercer, State of New Jersey, all in the manner according to and provided by law.

Sworn and subscribed to
before me this 30th day
of June, 1969.

A. M. Andaloro
New Jersey State Police

Frank J. Kingfield
Judge of the Superior Court

Search Warrant

STATE OF NEW JERSEY, }
COUNTY OF MERCER, } SS.:

To the Sheriff of the County of Mercer or to any County Detective of the County of Mercer or to any Police Officer or any State Police Officer of the State of New Jersey.

WHEREAS, Inv. A. M. Andaloro of the New Jersey State Police has this day made information on oath before me, Frank J. Kingfield a Judge of the Superior Court, State of New Jersey, that, the illegal practice commonly known as lottery in violation of 2A:121-3 of the laws of the State of New Jersey is being carried on on the public streets of Enterprize Ave., Grant Ave., Pennington Ave., Calhoun St., Princeton Ave., and Trent Street, all in the City of Trenton, County of Mercer, State of New Jersey, by a colored male known as Horace Shivers described as 6'0" 180 lbs., 30 years of age, wearing goatee and moustache, black hair in high pompadour style and operating a 1960 Rambler station wagon color black and white, N. J. registration NZW-692 and a 1959 Cadillac convertible color yellow, N. J. registration LBJ-707.

AND THE COURT being satisfied that grounds for granting the application for a search warrant exist.

NOW THEREFORE YOU ARE COMMANDED in the name of State of New Jersey, with the necessary and proper assistance to search the person of Horace Shivers hereinbefore described and the 1960 Rambler NXW1692, the 1959 Cadillac convertible LBJ-707 or any vehicle he may be found operating on the public streets of Enterprize Ave., Grant Ave., Pennington Ave., Calhoun St., Princeton Ave., or Trent St., all in the City of Trenton, County

of Mercer, State of New Jersey. This search to be conducted between the hours of 10:00 AM and 4:00 PM and if you there shall find that the illegal practice of lottery is being conducted, take into your possession all property including monies, lottery slips, tapes, pads, pens, pencils, and other paraphernalia used as a means of carrying on the illegal practice known as lottery which may be found to the end that the same may be dealt with according to law.

You Are Further Commanded, in the event you seize any of the above described articles to give a copy of this warrant together with a receipt for the property so seized to the person from whom it is taken or in whose possession it is found, or in the absence of such person to leave a copy of this warrant together with such receipt in the place where said property is found.

You Are Further Commanded to execute this warrant within ten (10) days from the issuance hereof and forthwith make return thereof to me with your report of the execution of this warrant and a written inventory of the property seized hereunder by you.

Given and issued under my hand this 30th day of June 1969.

Signed Frank J. Kingfield
Frank J. Kingfield
Judge of the Superior Court